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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. B. MACOMBER,
Plaintiff in Error,

vs.

J. O. GOLDTHWAITE,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

F. B. Macomber, plaintiff in error, up to the 14th day of December, 1921, was president and director of the Macomber-Savidge Lumber Company, which was a California corporation, engaged in the business of buying and selling lumber at San Francisco, California, and was a large stockholder in said company. (Trans. page 128.)

On the 14th day of December, 1921, all of the stockholders of the said Macomber-Savidge Lumber Company, which was financially embarrassed and unable to pay its debts, entered into an agreement of liquidation in which they appointed William C. Crittenden of San Francisco, California, trustee for, and on behalf of the *officers, directors* and *stockholders* of said corporation and the corporation to receive any and all

funds that may be due said corporation and deposit the same in a named bank, to pay off the indebtedness of the company and to pay whatever balance that remained to the stockholders. (Trans. pages 127 to 133 inc.)

They also agreed in said agreement that the business conducted by said corporation was to be *closed* on the 15th day of December, 1921, and that the trustee should sell before the 30th of December, 1921, the furniture and equipment of the office. (Trans. page 129 (4).)

It was further provided in said agreement that the said trustee shall not

> "accept any sum less than the full *face valuation* of any obligation due said corporation *unless he have the written consent of both F. B. Macomber and George J. Sivers.*" (Trans. pages 131, 132.)

It was further provided in the said agreement that during the pendency of the proceedings necessary to carry out the terms of the agreement that

> "none of said parties were to transact any business for or on behalf of the corporation, save and except the holding of a meeting for the purpose of authorizing and carrying out such steps as were necessary to enable the terms of the agreement to be complied with." (Trans. pages 132, 133.)

Mr. Crittenden accepted his appointment as trustee (Trans. pages 133, 134) and immediately after the execution of the agreement aforesaid entered upon his duties of liquidating the affairs of the Macomber-Savidge Lumber Company. He continued this work until February 21, 1922, when he resigned and was

succeeded by Irving H. Sanborn, Vice President of the American National Bank of San Francisco, who was authorized by written agreement of February 21, 1922, of Macomber-Savidge Lumber Company and its stockholders to be substituted as trustee instead of William C. Crittenden. (Trans. page 326.)

The said Macomber-Savidge Lumber Company and its stockholders by said assignment, assigned and transferred to the said Irving H. Sanborn, as trustee, all of its assets and accounts, including its account against the Modoc Lumber Company, hereinafter named, and authorized him to proceed to realize upon said assets as promptly as possible—to convert the same into money, and provided that the agreement of December 14, 1921, to wit, Plaintiff's Exhibit 11 (Trans. page 127), should be changed *only* in regard to *trustees* and *payments* and that this was done by execution of this latter agreement. (Trans. page 326.) By this latter agreement, the provision in the former agreement which stipulated that Macomber and Sivers were to *consent* in *writing* to the trustee accepting any sum less than the *full face* value of any obligation due said corporation was left in force, and none of the stockholders were given back any of the powers, which had been taken away by the former agreement.

J. O. Goldthwaite, defendant herein, was at the time of the making of said agreements, the executing of the notes to plaintiff in error, sued upon herein, and the filing of the above entitled case, a resident of Klamath Falls, Oregon, and was then and for a long time preceding, had been the president of the Modoc

Lumber Company, an Oregon corporation, which was engaged in the business of manufacturing lumber and the sale thereof at Klamath Falls, Oregon. He, at the time of signing the notes to plaintiff, hereinafter referred to, was, and had been, for a considerable period of time, the owner of all the capital stock of the Modoc Lumber Company, except two shares necessary to qualify its other directors. (Trans. page 138.) He continued as president and a principal stockholder of the Modoc Lumber Company up to March 8, 1925. (Trans. page 140.)

In July, 1921, the Modoc Lumber Company, being financially embarrassed, placed its affairs in the hands of the Board of Trade of San Francisco, California. (Trans. page 141.)

The Williamson River Logging Company was a subsidiary property of the Modoc Lumber Company and handled the logging end of the operation. (Trans. page 143.)

During the years 1920 to 1921, the Macomber-Savidge Lumber Company bought of the Modoc Lumber Company, a large amount of lumber to remain in the yards of the latter company, subject to the shipping orders of the former company, for which the Macomber-Savidge Lumber Company issued trade acceptances under a contract with the said Modoc Lumber Company that when the lumber was shipped and sold that the Modoc Lumber Company would pay to Macomber-Savidge Lumber Company the difference between the face value of the trade acceptances and the prices at which the same were sold by the Macom-

ber-Savidge Lumber Company. (Trans. pages 139-140.) These trade acceptances were sold by the Modoc Lumber Company and the Macomber-Savidge Lumber Company was compelled to pay them. The lumber bought by the Macomber-Savidge Lumber Company experienced a falling market, and the sales resulted in a heavy loss, and therefore the Modoc Lumber Company became indebted to Macomber-Savidge Lumber Company in a large sum. This sum so owed by the Modoc Lumber Company to the Macomber-Savidge Lumber Company was, on or about the 2nd day of March, 1922, agreed as being $71,000.00. (Testimony, F. B. Macomber, Trans. pages 145-150.) Statement of Court. (Trans. page 268.)

The Modoc Lumber Company, and its subsidiary, the Williamson River Logging Company, having placed their affairs in the hands of the San Francisco Board of Trade, as aforesaid, also assigned at the same time to the said San Francisco Board of Trade, its equity in the Modoc Lumber Company and the Williamson River Logging Company, together with the control of the stock in both corporations. After the said assignment, J. O. Goldthwaite, defendant in error, approached L. B. Menefee of Portland, Oregon, to loan the said Modoc Lumber Company the sum of $250,000.00 secured by first mortgage on the plant and property of the Modoc Lumber Company and the Williamson River Logging Company. Before Mr. Menefee would make the loan, he insisted that the unsecured creditors of the Modoc Lumber Company—some one hundred and ten in number, of which the Macomber-Savidge Lumber Company was the largest,

with its claim of $71,000.00—should be gotten together and the time for the payment of the claims extended. Mr. Menefee made a further condition that the amount of the creditors' claims should be secured by second mortgage and that the said amount of the creditors' claims filed should not exceed the *sum of $178,582.00.* (Trans. pages 142, 143, 144, 206, 207, 208, 209.)

During the period of these negotiations, the San Francisco Board of Trade and Mr. Goldthwaite, the defendant in error, succeeded in obtaining the consent of practically all the creditors, with the exception of F. B. Macomber, plaintiff in error (see testimony of J. O. Goldthwaite, Trans. pages 142, 143, 144, 206, 207, 208), and to secure the success of the negotiations of Mr. Menefee, it was necessary for J. O. Goldthwaite, defendant in error, to not only secure the filing of the Macomber claim with the San Francisco Board of Trade, but in addition to that it was necessary to have the claim divided in such a manner that the claim put in with the Board of Trade would amount to about $53,000.00, instead of $71,000.00. (Trans. page 218.) If F. B. Macomber would not consent, as provided in Plaintiff's Exhibit 11, (Trans. page 127), to the trustee of the Macomber-Savidge Lumber Company reducing the claim, as aforesaid, and filing it with the said Board of Trade, defendant in error would not be able to comply with Mr. Menefee's demands of reducing the amount of the creditors' claims to the sum of $178,582.00 hereinbefore mentioned. Upon Macomber's said consent as *an individual,* depended the success of the negotiations aforesaid.

In an attempt to comply with Mr. Menefee's conditions aforesaid, between the dates of December 15, 1921, and March 3, 1922, and during the time in which the Macomber-Savidge Lumber Company was in the process of liquidation and in the hands of its assignees and trustees, and while Mr. F. B. Macomber, plaintiff in error herein, had, under the terms of the agreement hereinbefore cited, no power either as an officer or a stockholder, to do anything but to *consent on his own behalf* that the bill owing by the Modoc Lumber Company to the Macomber-Savidge Lumber Company be divided as aforesaid, and/or to consent to its filing with the San Francisco Board of Trade,—J. O. Goldthwaite, the defendant in error, *knowing* that the company was in the hands of an assignee and trustee (testimony of J. O. Goldthwaite, pages 153, 210, 212, 213), undertook negotiations with F. B. Macomber, plaintiff in error, to obtain his consent to the trustee filing a claim in bankruptcy in the reduced amount of $53,000.00.

Mr. Macomber, on February 28, 1922, agreed to, as far as he was concerned, and in accordance with the only powers that he had left under the trustee agreement aforesaid to *consent* to the division and reduction of the claim of the Macomber-Savidge Lumber Company and to *consent* to the filing by the trustee of part of said claim in the sum of about $53,000.00 if J. O. Goldthwaite, defendant in error, would approve the entire amount owing by his company to Macomber-Savidge Lumber Company, and would personally give his individual ten notes to F. B. Macomber as an

individual in the sum of $5000.00 each for obtaining the individual consent of Mr. Macomber to the loss to his individual interest, which would result because of the loss of the immediate right to proceed against the debtor, because of the allowing the Menefee interests priority in security between the mortgages, and also because it would effectuate the giving up by the Macomber-Savidge Lumber Company of a right to have the balance of its claim, to wit about $18,000.00 secured, postponing it to a third and inferior position and thus involving Macomber in an individual loss. This was agreed to by Mr. J. O. Goldthwaite, and the agreement so reached was reduced to writing, a copy of which agreement is as follows:

"February 28, 1922.

Mr. J. O. Goldthwaite,
Aspgrove, Oregon,
Dear Sir:

Referring to our conversation to-day and our *personal agreement* in connection with the *claim* of the Macomber Savidge Lumber Co. *against* the Modoc Lumber Co. which has developed through the purchase of lumber under certain agreements and guarantees:

You hereby approve the claim of the Macomber Savidge Lumber Co. as submitted with the understanding that all items of interest on Trade Acceptances still unpaid are to be added to this account, and I hereby agree *that any and all payments made by the Modoc Lumber Co. either direct or through the San Francisco Board of Trade,* are to apply against *the personal notes given* to me by you to the amount of said notes.

Yours very truly,
F. B. Macomber,
Approved: J. O. Goldthwaite."

The next day, to wit, March 1, 1922, defendant signed and delivered to F. B. Macomber, plaintiff in error, the said ten (10) individual notes, all of which were dated of said date. The first of said notes was made to fall due September 1, 1922, and the remaining notes respectively, January 1, 1923, April 1, 1923, July 1, 1923, October 1, 1923, January 1, 1924, April 1, 1924, July 1, 1924, October 1, 1924, and January 1, 1925. (See Plaintiff's Exhibits 1 to 10 inc., Trans. pp. 106 to 109 inc.)

For more convenient reference hereto the form of the notes so executed is set forth as follows:

$5,000.00

San Francisco, Calif.
March 1. 1922

On or before September 1st, 1922, after date I promise to pay to the order of F. B. Macomber five thousand and no/100 dollars at 806 Hobart Bldg., San Francisco *Value received* with interest at 6% per annum.

No..... Due.....

J. O. GOLDTHWAITE."

(Documentary United States Internal Revenue $1.00 on back.)

After thus securing the said consent of F. B. Macomber as an individual as required by the agreement of stockholders aforesaid, the trustee of the Macomber-Savidge Lumber Company, on or about the 26th day of May, 1922, filed the said reduced claim of the Macomber-Savidge Lumber Company with the Board of Trade of San Francisco, State of California, and thereafter, in accordance with the general plan aforesaid outlined by defendant Goldthwaite, the Menefee interests of Portland, Oregon, advanced to

the Modoc Lumber Company aforesaid the sum of $250,000.00 and took a first mortgage over all of the assets of the Modoc Lumber Company and its subsidiary, the Williamson River Logging Company and the Board of Trade of San Francisco, California, took a second mortgage from the Modoc Lumber Company and the said Williamson River Logging Company in the sum of about $178,582.00 secured by deed of trust. Thereupon the said Modoc Lumber Company with the proceeds thus derived from the Menefee interests and the postponement of any action against them by the said one hundred and ten (110) creditors resumed their mill operations for a comparatively short period and then closed down.

On or about the 4th day of September, 1924, the Board of Trade of San Francisco sold its claims against the Modoc Lumber Company which were secured by second mortgage to the Menefee interests for the sum of $53,577.78, which was divided among the creditors. From this sum, the trustee of the Macomber-Savidge Lumber Company received the sum of about $16,500.00, and F. B. Macomber, plaintiff in error herein, in accordance with his personal agreement that any and all payments made by the Modoc Lumber Company were to apply upon the personal notes given by J. O. Goldthwaite as an individual to F. B. Macomber as an individual applied the amounts upon the said notes. Thereafter, plaintiff in error, through his attorneys, made written demand upon the said defendant in error for the payment of the notes hereinbefore described, and no payment having been made filed suit in the District Court of the

United States for the District of Oregon against the defendant. Trial was had of the said case on the 22nd day of April, 1926, before the court without a jury and a judgment was rendered in favor of the defendant in error, and from said judgment, the plaintiff in error has brought said judgment to this court by writ of error.

ASSIGNMENTS OF ERROR.

The errors asserted and relied upon by plaintiff (plaintiff in error) are as follows (Trans. pages 80 to 99):

I.

The Court erred in refusing to sustain and in overruling the plaintiff's objection to plaintiff testifying under cross-examination, in answer to the following questions propounded by counsel for defendant, to wit:

> "Was there any argument between you, or differences, as to whether you would put your claim into the Board of Trade, or that of your company, at that time?
>
> A. Any argument with whom?
>
> Q. Between Mr. Goldthwaite and yourself, as to whether or not the Macomber-Savidge Lumber Company would put its claim in the Board of Trade, speaking of just before the notes were signed, or at the time.
>
> Mr. Van Duyn. I object to any conversation immediately before the notes were signed, or at the time, on the ground that there would be an attempt to vary a written agreement by parol evidence, contrary to the statute of frauds, in trying to show security, and contrary to Section 713 of the Statutes of the State of Oregon.

COURT. We will consider that question when the evidence is in.

MR. VEAZIE. We don't want to vary a written contract; only showing the circumstances and what was preliminary to it; the groundwork upon which this is based, as to whether there was anything of the kind.

MR. VAN DUYN. Will the Court allow us an exception?

COURT. Certainly."

And the Court erred in requiring plaintiff to testify and admitting, over the above objection, evidence of oral conversation had between plaintiff and defendant prior to the execution of Plaintiff's Exhibits 1 to 10 inclusive, which conversations were in substance and effect that defendant wanted plaintiff to consent to the Macomber-Savidge Lumber Company putting its claim into the Board of Trade with other creditors; that plaintiff did not consent to said claim being filed with the San Francisco Board of Trade until after the defendant had handed him the said notes and exhibits; that said consent was only for himself; that the Crittenden agreement (Plaintiff's Exhibit 11) says the stockholders shall act for themselves; that plaintiff never told Sanborn, the trustee of the Macomber-Savidge Lumber Company, what to do in filing said claim; that said Sanborn was trustee when the notes were executed; that plaintiff told Sanborn to file the said claim as far as he (plaintiff) was personally concerned; that plaintiff understood at the time the said notes, Plaintiff's Exhibits 1 to 10, were executed, that said claim aforesaid was to be filed with the Board of Trade; that the second mortgage to

secure said claim was not talked of between defendant and plaintiff prior to the execution of said notes, Plaintiff's Exhibits 1 to 10; that Goldthwaite said in said conversation that there were negotiations with Menefee, and that he wanted to get matters in shape; that defendant stated to plaintiff in said conversation that he desired to have the claim of Macomber-Savidge Lumber Company reduced so it would not run above a prescribed maximum; that defendant in said conversation said that he had made a statement to the Board of Trade that he didn't owe his creditors to exceed $180,000.00; that Macomber-Savidge Lumber Company's claim against the Modoc Lumber Company would run the indebtedness above that sum; that said claim had to be cut down; that plaintiff at defendant's request gave his personal consent to the trustee for the Modoc Lumber Company to reduce its claim against the Modoc Lumber Company so as to fall within the $180,000.00 limit.

And the Court erred in taking said evidence into consideration in its opinion and findings, conclusions of law, and judgment, as evidence showing and tending to show that the notes sued on were collateral security.

II.

The Court erred in refusing to sustain and in overruling plaintiff's objection to defendant J. O. Goldthwaite testifying in answer to the following questions propounded to him by counsel for defendant, to wit:

> "Q. At the time of the meeting when you agreed to approve the account on behalf of your

company, was Mr. Macomber making any question as to whether he represented his company or himself personally?

Mr. VAN DUYN. We object as incompetent, irrelevant and immaterial, and parol testimony tending to vary an agreement which was reduced to writing.

COURT. It will be admitted, subject to that objection.

Mr. VAN DUYN. May we have exceptions to questions of like kind; as I understand, the same ruling and exception.

COURT. Yes."

And the Court erred, over said objection, in permitting defendant to testify in substance and effect that there was no such question as to whom plaintiff represented at the meeting at which defendant executed his said notes to plaintiff; that Defendant's Exhibit "E" was considered at that meeting; that plaintiff agreed to reduce said claim and file it with the Board of Trade; that defendant told plaintiff about February 28, 1922, about his desire to give a first mortgage and to fund the indebtedness to his other creditors; that defendant then told plaintiff that Menefee and Jones, proposed lenders, would not lend the money to him if there was to be a second mortgage above the sum of $175,000.00, and that it was necessary to reduce creditors' claims to that sum, and it was necessary to reduce the Macomber-Savidge Lumber Company's claim to fall within said amount; that Plaintiff's Exhibits 1 to 10 inclusive, and Defendant's Exhibit "B" were executed at a later date than shown by said exhibits.

And the Court erred in taking said evidence into consideration in its opinion and findings, conclusions of law and judgment, as evidence showing and tending to show that the notes sued on were collateral security.

III.

The Court erred in refusing to sustain, and in overruling plaintiff's objection to defendant J. O. Goldthwaite testifying in answer to the following questions propounded to him by counsel for defendant, and permitting defendant to make the following answers, to wit:

"Q. Did you have any discussion with Mr. Macomber as to the note?

A. Yes, I protested at the time that the account at the time was the Modoc Lumber Company account of indebtedness to Macomber-Savidge Lumber Company.

Mr. VAN DUYN. This is understood to be all subject to the same objection.

COURT. All the evidence which may tend to vary the contract is under your objection, yes.

Mr. VEAZIE. We don't want to vary it ourselves; we want to show the setting of it.

COURT. I think I understand what you are trying to show, yes.

Q. You may continue your answer. You say that you protested that the indebtedness was between the two corporations?

A. Yes, I told him at the time that the notes logically should run to the Macomber-Savidge Lumber Company. At that time the Macomber-Savidge Lumber Company had no evidence of the debt outside of an open book account, and Mr. Macomber explained that to me first—emphasized that, I mean. Secondly, he outlined to me again as he had on a number of occasions past, the fact that he was having a great deal of trouble with

his other partners in the Macomber Savidge Company; that he had had trouble with his first assignee, Crittenden; that he didn't know how the new assignee, Sanborn, was going to act, and that he desired if possible to have these notes in his own name, in case any trouble arose in the future, where he would have the whiphand, or dominate the situation within his own company. He went into some extensive length in impressing me with that situation.

Q. Did you at that time owe Mr. Macomber personally any money?

A. Not at that time or any other time, no, sir.

Q. He never loaned you any money?

A. No, sir."

And the Court erred in taking said evidence into consideration in its opinion, findings, conclusions and judgment, as evidence showing or tending to show that the notes sued on were collateral security.

IV.

The Court erred in refusing to sustain, and in overruling plaintiff's objection to defendant J. O. Goldthwaite testifying, in answer to the following questions propounded to him by counsel for defendant, and permitting defendant to make the following answers, to wit:

"Q. Was there any other consideration given to you for the execution of these notes that you have set forth in your answer?

Mr. Van Duyn. No failure of consideration pleaded.

Mr. Veazie. We pleaded exactly what the consideration was, and I simply asked him if there was any other consideration.

A. None whatever, no, sir.

Mr. VAN DUYN. Objected to upon the ground that it has not been pleaded in the answer or further defense of the defendant, and varies the contract.

COURT. Admitted, subject to that objection and exception.

Q. Under these circumstances you then signed the notes which are in evidence?

A. Yes."

And the Court erred in taking said evidence into consideration in its opinion, findings, conclusions and judgment, as evidence showing or tending to show that the notes sued on were collateral security.

V.

The Court erred in permitting J. O. Goldthwaite, the defendant, a witness on his own behalf, over the objection of counsel for plaintiff that such testimony would tend to vary the notes sued upon, to testify in attempted support of the further and separate defense set forth in the amended answer, in substance that there was no personal consideration between plaintiff and defendant for the notes sued upon; that the said notes were made payable to plaintiff over defendant's protest; that plaintiff insisted that said notes be made payable to plaintiff; that said notes were made at another date than the date of execution set forth therein; that proceedings were had before the Creditors' Committee of the San Francisco Board of Trade that resulted in the claim of Macomber-Savidge Lumber Company being, with other claims being evidenced by a series of notes of the Modoc Lumber Company and the Williamson River Logging Com-

pany; and the alleged sale of said notes and mortgages to the L. B. Menefee Investment Company, and the alleged payment and release of the same.

VI.

The Court erred in permitting J. O. Goldthwaite and G. W. Brainard, witnesses on behalf of the defendant, to testify over the objection of plaintiff, that said testimony was immaterial and that it would tend to vary plaintiff's Exhibits 1 to 10 inclusive, as to the transactions had before the Board of Trade of San Francisco, and as to the payment of the notes and mortgages.

VII.

The Court erred in stating the law of the case as follows:

In the District Court of the United States
for the District of Oregon

F. B. Macomber,	Plaintiff,
vs.	
J. O. Goldthwaite,	Defendant.

L. 9664

Portland, Oregon, June 7, 1926.

Memorandum by Bean, District Judge:

This is an action on ten promissory notes executed by the defendant and made payable to the plaintiff, each dated March 1, 1922, and each for five thousand dollars.

The facts are not seriously in controversy. At the time the notes were given the plaintiff was the president and one of the principal stockholders of the Macomber-Savidge Lumber Company, a California corporation, which had been engaged in the business of buying and selling lumber in California and elsewhere, and the defendant was the president and principal stockholder and general manager of the Modoc Lumber Company, which had been engaged in manufacturing lumber for sale.

During the years 1920 and 1921 the Macomber Company had purchased a large quantity of lumber from the Modoc Company, and on account thereof had a claim against it for seventy-one thousand dollars, or thereabouts, some of the items of which, however, were in dispute.

Each of the corporations was in financial trouble. The assets of the Macomber Company were in the hands of a trustee, and the affairs of the Modoc Company were being handled by the San Francisco Board of Trade.

The defendant, as president of the Modoc Company, had arranged for refinancing his company by obtaining a loan of two hundred and fifty thousand dollars, to be secured by first mortgage on its property, but as a condition to making the loan the lender insisted that the claim of its creditors should not exceed a certain amount, and should be assembled and secured by a second mortgage on the property. To consummate this arrangement it was necessary that the claims of the creditors of the Modoc Company be assigned to a

representative of the San Francisco Board of Trade. By the latter part of February, 1922, all such creditors except the Macomber Company had made such assignment. In order to accomplish the refinancing of the corporation and comply with the conditions imposed by the proposed lender of the two hundred and fifty thousand dollars, it was necessary to obtain a reduction of the Macomber Company claim to approximately fifty thousand dollars in amount, and to assign then to the Board of Trade. The defendant thereupon approached the plaintiff to obtain his consent to a reduction of the claim to such an amount, and to the assignment thereof, to a representative of the Board of Trade, so that the refinancing of the Modoc Company could be consummated. After some negotiation the defendant, on behalf of his company, agreed to approve the claim of the Macomber Company as made by it, but plaintiff agreed that, for the purpose of assignment to the Board of Trade, it might be reduced to about $54,000.00, and the defendant executed and delivered to him the promissory notes in suit, for the amount thereof, he agreeing in writing that any and all payments made by the Modoc Company, either direct or through the Board of Trade, should be applied on such notes.

The claim of the Macomber Company for the reduced amount was thereupon assigned to the Board of Trade, or to its representatives, and the refinancing of the Modoc Company accomplished by the execution by it of a first mortgage on its property for $250,000.00, and a second mortgage to secure the

claims of its creditors, including the Macomber Company.

Thereafter, and on May 26, 1922, the Board of Trade advised the Modoc Company in writing that the claims of the various creditors, including that of the Macomber Company, had been fully paid and satisfied in full. The second mortgage was subsequently sold by the Board of Trade for thirty cents on the dollar and the proceeds applied on the various claims in proportion to their respective amounts, and the plaintiff gave credit on the notes in suit for the dividend on the Macomber Company's claim. Later the second mortgage was paid in full by the Modoc Company to the assignee thereof.

The defendant claims that the legal effect of the transaction was to make his notes security or a limited guaranty for the reduced claim of the Macomber Company, and that they were discharged or released when the mortgage of the Modoc Company securing the same was paid and satisfied in full. While the plaintiff's position is that the notes were a personal matter between himself and the defendant, unaffected by any transactions in which their respective companies were concerned, other than this personal agreement that any payments made by the Modoc Company either directly or through the Board of Trade, should be credited on the notes.

Without discussing the question at length, I am disposed to accept the defendant's version of the transaction. The plaintiff and the defendant were each assuming to act for and on behalf of his respective

corporation. There was no unsettled differences between them personally. The only debt existing at the time the notes were given, and about which they were dealing, was the debt of the Modoc Company to the Macomber Company. The plaintiff personally made no demands on the defendant, nor did the latter owe him anything. The notes were not given on account of any personal obligation of the defendant to the plaintiff, but because of the account due the Macomber Company from the Modoc Company. They were made for the benefit of the Modoc Company. The legal effect was to make them as security or guaranty of its debt, and when the mortgage securing the same was paid, the obligation of the maker of the notes was satisfied.

The admission of parol evidence to show the true relationship of the parties and the nature and character of the transaction, did not alter or vary the terms of the original contract, nor affect its integrity. It was merely proof of an independent collateral fact which affected the rights of the parties thereto by showing that the notes were in fact security for the debt or liability of another, and not as a personal obligation to the plaintiff. (Hoffman v. Habighorst, 38 Or. 361; 49 Or. 379; Silva v. Gordo 224 Pac. 757; Norton v. Tueson Cattle Co., 236 Pac. 1110; Ledford v. Huggans, 214 Pac. 686; Clark v. Duchmean, 72 Pac. 331.)

Findings and judgment may be entered accordingly.

VIII.

The Court erred in paragraph VI of its findings of fact on file herein, in making the following finding:

> "To obtain said concession, the Modoc Lumber Company and the defendant on the one part, agreed with the Macomber-Savidge Lumber Company and the plaintiff herein, on the other part, that the Macomber-Savidge Lumber Company, through its trustee, should present and assign its claim to the Board of Trade of San Francisco for inclusion in the second mortgage or other form of funded indebtedness, in the amount of only $53,905.92, and that in consideration thereof the Modoc Lumber Company should approve the claim of the Macomber-Savidge Lumber Company, as stated by it, in the amount of $68,164.83, and in addition thereto that the defendant should guarantee the payment of part of the said claim, to-wit: to the amount of $50,000.00, by giving the promissory notes described in the complaint, and hereinafter mentioned, on the understanding that the said portion thereof turned over to the Board of Trade of San Francisco should be converted into notes or other evidence of indebtedness signed by the Modoc Lumber Company and the Williamson River Logging Company, and secured by a second mortgage or some form of lien on the properties above mentioned, and that any and all payments made on any part of said indebtedness of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, whether on the part thereof so turned over to, or handled through the Board of Trade of San Francisco, or the balance thereof not so turned over or assigned, should be credited against the said personal notes to be given by the defendant herein as a guaranty, up to the amount of defendant's said notes."

In that there is no evidence of any kind in the record to support such opinion, but on the contrary the

evidence adequately shows without contradiction, uncertainty or conflict, that there was no agreement made between plaintiff and defendant that the defendant should guarantee $50,000.00 or any other sum, or at all, of the claims of Macomber-Savidge Lumber Company, by giving the notes sued on herein.

IX.

The Court erred in paragraph VII of its findings of fact on file herein, in making the following finding:

> "The said ten promissory notes described in the Amended Complaint were each and all made, given and delivered by the defendant, and taken, accepted and received by the plaintiff, for the use and benefit of, and as agent for, the Macomber-Savidge Lumber Company, solely on the considerations aforesaid, and on the agreement and understanding between the parties to said notes, had and entered into at the same time the notes were given, that the defendant should thereby become bound as surety and guarantor for the Modoc Lumber Company, up to the amount of $50,000.00 for the payment of said indebtedness then existing and owing from the last named company to the Macomber-Savidge Lumber Company, as hereinbefore set forth, and not otherwise."

In that there is no evidence of any kind in the record to support such finding or any part thereof.

X.

The Court erred in paragraph XV of its findings of fact on file herein, in making the following finding:

> "By the making of the payments aforesaid there has been paid on account of the said orig-

inal indebtedness of the Modoc Lumber Company to the Macomber-Savidge Lumber Company existing and unpaid on the first day of March, 1922, to which the notes of the defendant sued on herein were a collateral security and stood as a limited guaranty, an amount in excess of the said guaranty, and said guaranty has thereby been fully exonerated. Furthermore, the mortgaged properties which were released from the lien of said mortgage far exceeded in value the first and second mortgages against the same, and by the release of the said mortgage security, the defendant has been released from liability on said guaranty covered by the notes sued on herein."

In that there is no evidence whatever in the record that said defendant's notes sued on herein were collateral security, or stood as a limited guaranty and/or that any payment has been made upon the notes sued on, except as in the amended complaint set forth, and/or that none of said notes have been discharged.

XI.

The Court erred in failing to make findings on all the material issues of this cause, to wit, in failing and omitting to find that the Macomber-Savidge Lumber Company made an assignment on December 14, 1921, of all its assets, including the claim against the Modoc Lumber Company, and that by said assignment the plaintiff herein was deprived of all power to represent his company, and had thereafter no power in relation thereto, except to give individual consent to acts of trustee, as is more particularly set out in paragraph V of the amended reply, and as evidenced by Plaintiff's Exhibit 11, the Crittenden agreement.

XII.

The Court erred in making the following conclusions of law:

I.

The foregoing facts and circumstances as covered by the Findings of Fact made herein, were such as to constitute the defendant nothing more than a limited guarantor of the payment of the debt of his company, the Modoc Lumber Company, to the Macomber-Savidge Lumber Company, up to the amount of the notes set forth in the Amended Complaint; said guaranty to be fully discharged whenever an amount equal to the total of the notes should be paid on the principal debt to which said guaranty was collateral.

II.

Said guaranty was fully discharged and the defendant was exonerated from further liability thereon when the second mortgage notes of the Modoc Lumber Company were paid and discharged, as set forth in the above Findings.

III.

Defendant is entitled to have judgment herein that the plaintiff have and recover nothing on the promissory notes set forth in the Amended Complaint; that said action be dismissed; and that defendant have and recover of and from the plaintiff the defendant's costs and disbursements.

In that said conclusions are based upon no evidence and are not justified by the findings.

XIII.

The Court erred in giving judgment against the plaintiff and in favor of the defendant, on the ground that the notes of defendant sued on by plaintiff herein were collateral security to the claim of the Macomber-

Savidge Lumber Company, and the claim having been paid, the notes were discharged; in that the evidence shows without dispute or contradiction, that the only written contracts between the parties were the notes themselves and a written personal agreement between plaintiff and defendant identified in the evidence as Defendant's Exhibit "B", which exhibit states no contract of suretyship; the only evidence antedating the execution of said notes and pertaining to the reasons why the same were given, was the evidence of J. O. Goldthwaite in which he relates an oral conversation had with plaintiff, in no part of which was mention made of suretyship, and defendant's testimony under cross-examination that no conversation was had between plaintiff and defendant concerning the notes sued on herein;

The Court erred in admitting in evidence and in taking into consideration, in giving its opinion and rendering its findings of fact and conclusions of law and judgment, said oral conversation, and in considering any other evidence than Plaintiff's Exhibits 1 to 10 inclusive, and Defendant's Exhibit "B".

ARGUMENT.

POINT I.

ASSIGNMENTS OF ERROR I TO VI INCLUSIVE.

(Trans. pp. 80 to 88.)

The notes sued upon were plain and unambiguous promises to pay, needing no oral explanations. The notes in themselves acknowledged the consideration by stating therein that there was "value received". The answer of defendant (Trans. pp. 22 to 39)

pleaded no illegal, partial or entire failure of consideration, and admitted the *making, execution and delivery* of the notes. Defendant's only defense was that said notes were guaranty and surety notes only to the amount of the Macomber-Savidge Lumber Company claim against the Modoc Lumber Company, and that said alleged notes of guaranty were released because the said claim of the Modoc Lumber Company was paid. To the end of making proof under this defense, defendant sought to make oral proof both through cross-examination of plaintiff, Macomber, and direct examination of defendant Goldthwaite. To this, plaintiff objected (Trans. p. 81) on two principal grounds, to wit:

1. That a written agreement cannot be varied by parol testimony.

2. That parol testimony, under the Statute of Frauds, is inadmissible to prove a guaranty. The objections were reiterated in each of the assignments of error named in this subdivision (Point I).

In view of the law of Negotiable Instruments as adopted by the legislature of the State of California, to wit, Sec. 3105, Civil Code of California, in which State the notes herein in question were executed and delivered and under which they are to be interpreted, that:

> "Every negotiable instrument is deemed prima facie to have been issued for a valuable considertion; every person whose signature appears thereon to have become a party thereto for value"

and in view of the fact that defendant had not pleaded absence or failure of consideration as re-

quired by section 3109 of the *Civil Code of California*, which reads as follows:

> "That absence or failure of consideration is a matter of defense as against any person not a holder in due course."

And in view of the following authorities, defendant, having failed to allege an absence or failure of consideration, is not entitled to enter by parol into the matter of consideration in a contract, for the purpose of showing that the consideration or the contract is a different one than that set out in the notes.

The Code States require a want of consideration or illegality of consideration to be specially pleaded.

In 8 *Corpus Juris, Bills and Notes*, p. 965, Sec. 1265, the rule is laid down as follows:

> "At common law, failure, illegality, or want of consideration may be shown under the general issue; and it has been held that a plea in bar alleging a want of consideration is bad on demurrer as amounting to the general issue. On the other hand, the general rule, independent of statute, is that a partial failure of consideration cannot be shown under the general issue. In the code states, however, where affirmative defenses are required to be specially pleaded, and by statute or rule of court in some of the other states, it is now the general rule that all of such defenses must be specially pleaded, in order to be available, and that evidence thereof is not admissible under a general denial."

Section 73, Vol. 1 *Lord's Oregon Laws*, provides as follows:

> "The answer of the defendant shall contain,—
>
> 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; provided, how-

ever, that nothing can be proved under a general denial that could not be proved under a specific denial of the same allegation or allegations.

2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition."

The Oregon Courts hold that the Oregon Code has substituted for the general issue at common law an answer which must contain a specific denial of the material allegations intended to be controverted: *Coos Bay R. R. Co. v. Siglin,* 26 Or. 390, 38 Pac. 192, that under a denial, the defendant should be permitted to show no fact that does not go directly to disprove the fact denied. If he merely denies the facts alleged by his answer, he can only offer in evidence such facts as go to disprove the plaintiff's cause of action, and if he intends to rest his defense on any fact that does not tend to disprove the plaintiff's cause, such fact is new matter, and must be pleaded: *Buchtel v. Evans,* 21 Or. 312, 28 Pac. 67; that the object of the answer is to *notify the court and the opposite party* of the facts relied on as a defense *so plainly* that the plaintiff may be prepared to meet them. A pleading would be entirely defeated if a plaintiff had a right to aver in his complaint one ground of action and on the trial prove another and different one: *Troy Laundry Co. v. Henry,* 23 Or. 237, 31 Pac. 484; *Knahtla v. O. S. L. R. Co.,* 21 Or. 137, 27 Pac. 91."

The California Code provision in regard to new matter in the answer is almost word for word like the Oregon Code.

The following California cases uphold the doctrine stated above:

Pastene v. Pardini, 135 Calif. 431, 67 Pac. 681;
Sharon v. Sharon, 68 Calif. 29, 8 Pac. 614;
Winters v. Rush, 34 Calif. 136.

And in view of the law of evidence as to varying a written contract by parol evidence and proving guarantees upon oral testimony hereinafter set out, we contend that the Court was in error in admitting the oral conversations which were received in evidence.

Parol Evidence Not Admissible to Vary Written Instrument.

"Where parties have entered into a contract or agreement which has been reduced to a writing, it is a general rule that in the absence of fraud or mistake, if the writing is complete upon its face and unambiguous, parol evidence is not admissible to contradict, vary, alter, add to or detract from the terms of the instrument."

Ency. of Evidence, Vol. 9, Parol Evidence, p. 321.

"Where parties have reduced their obligations or agreements to a writing which is upon its face couched in such terms as to import a complete legal obligation with no uncertainty as to the nature, character, object and extent of their agreement, all prior negotiations and agreements are regarded as merged therein, and the conclusive presumption arises that the whole engagement of the parties is expressed in the writing. This, the common-law rule, was intended to guard against fraud and injustice by not permitting parties to deny their solemn written agreements, or overthrow them by the uncertain words and memories of unreliable witnesses."

Idem, p. 325.

"Although this rule is in many cases spoken of as a rule of evidence, yet it is declared in a recent case that according to the modern and better view the rule is one of substantive law and not of evidence, parol proof being excluded not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it

(being outside the writing by which the parties have undertaken to be bound), shall not be shown. And this latter view has the support of the modern text writers upon the subject."

Idem, p. 326.

"Where a written instrument is valid, clear and unambiguous upon its face, and purports to contain the complete agreement of the parties, parol evidence is not admissible to show that the actual or secret intent of the parties thereto was other than is expressed in the writing, as in such a case the terms of the instrument alone must be looked to to ascertain the intention."

Idem, p. 329.

"The general rule applies to conversations and negotiations prior to or in connection with the execution of a writing, as in such cases all negotiations and conversations are presumed to be merged in the writing.

It is a general rule that evidence of a prior or contemporaneous agreement which is inconsistent with the terms of a written instrument, complete upon its face, and unambiguous, is, in the absence of fraud or mistake, inadmissible to contradict, vary or in any way alter the terms of the written instrument, as all such agreements are presumed to be merged in the writing, or if not embraced therein, to have been rejected by the parties.

"The rule excluding parol evidence is applicable not only to the terms of the instrument, but also excludes such evidence where it will operate to contradict or vary the legal effect thereof. If the instrument as executed by the parties is clear and unambiguous in its meaning, and has a well-settled legal construction or effect, such construction or effect will control and is not subject to contradiction by parol evidence, in the absence of fraud, accident or mistake."

Idem, pp. 330 to 334.

"It is a well established rule of the common law, which has been embodied in statutes in a number of states, that when any judgment of any court, or any other judicial or official proceeding, or any agent or other disposition of property, or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document or series of documents, the contents of such documents cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence.

"Reason for rule. It has been said that the rule is founded on the long experience that written evidence is so much more certain and accurate than that which rests in fleeting memory only, that it would be unsafe, when parties have expressed the terms of their contract in writing, to admit weaker evidence to control and vary the stronger and to show that the parties intended a different contract from that expressed in the writing signed by them. And if the uncertainty of 'slippery memory' furnished a ground for excluding such verbal testimony, as declared in the days of Lord Coke, certainly the modern practice, admitting as witnesses the parties directly interested, makes a strict adherence to the rule still more urgent in these days.

"The rule is a necessary one because of the obvious fact that written instruments would soon come to be of little value if their explicit provisions could be varied, controlled, or superseded by parol evidence, and it is also plain that a different rule would greatly increase the temptations as to commit perjury; and courts have expressed regret that in their anxiety to avoid possible injustice in particular cases, they have been gradually construing away a principle which has always been considered one of the greatest barriers against fraud and perjury."

"Rule of substantive law or of evidence. It has been asserted that the rule under discussion

is one of evidence merely, and does not depend upon the doctrine of estoppel at law, or upon the statute of frauds, although it rests on substantially the same principle. But according to the modern and better view the rule which prohibits the modification of a written contract by parol is a rule, not of evidence merely, but of substantive law. As the question is not one of practical importance it is not deemed necessary to refer to the numerous cases in which one or the other view has been expressed."

22 *C. J.* Sec. 1380, p. 1070.

"The legal effect of a written instrument, even though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, explained, or controlled by parol or extrinsic evidence than if such effect had been expressed, especially if persons who were not present at its execution have acted on the instrument as legally construed."

Idem, Sec. 1381, p. 1075.

"Although the authorities as to the admissibility of parol evidence to affect commercial paper are by no means uniform, the general rule is that bills, notes, and other instruments of a similar nature are not subject to be varied or contradicted by parol or extrinsic evidence."

22 *C. J.,* Sec. 1443, p. 1089.

"It is not permissible to show a parol agreement of the payee or holder of commercial paper not to enforce payment against the person or persons liable thereon; or a parol agreement that the payee or holder shall look to some other person or persons for payment, that he shall require payment only in a certain event or out of some particular fund, that he shall not require payment until a certain security has been exhausted, that he shall not call on one of the persons liable for payment until all remedies against

the others have been exhausted, or that the obligation may be extinguished by part payment."

22 *C. J.*, Sec. 1445, p. 1091.

"A statute which allows a party to call his adversary as a witness furnishes no ground for establishing an exception to the parol evidence rule, for if the matter could thus be opened up, other witnesses might be called, and all the consequences which the rule is designed to prevent might follow."

22 *C. J.*, Sec. 1530, p. 1144.

"Where a bill or note or other negotiable instrument is absolute in its terms, neither the maker nor the indorser can be allowed to show that the obligation was a conditional one merely or was to be paid only in a certain contingency, and this is true notwithstanding the fact that the note was given pursuant to a verbal agreement for the payment of a sum of money on a certain contingency, for the condition must be held to have been waived by the giving of an unconditional note. But it may be shown, as between the parties or others having notice, that the *delivery* was conditional only and that the instrument never in fact *came into force* as a binding obligation."

22 *C. J.*, Sec. 1542, p. 1152.

"Where the language used is clear and unambiguous, extrinsic evidence is not admissible on the ground of aiding the construction, for in such case the only thing which could be accomplished would be to show the meaning of the writing to be other than what its terms express, and the instrument cannot be varied or contradicted under the guise of explanation or construction. Nor can any evidence of the language employed by the parties in making the contract be resorted to except that which is furnished by the writing itself. It is also well established

that parol evidence is not admissible to give to a writing a construction conformable to the secret intentions which one or both of the parties may have entertained but which the writing fails to express."

22 *C. J.*, Sec. 1570, p. 1177.

"The parol evidence which can be admitted to explain the contract must be such as tends to show the correct interpretation of the language used, and its only purpose is to enable the court or jury to understand what the language really means; evidence which has no tendency to aid in the construction of the writing or to explain any ambiguity therein cannot be received. It is therefore necessary that the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument should be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to be written."

22 *C. J.*, Sec. 1571, p. 1179.

For further authorities on the above subject, see the

"Modern Law of Evidence," Chamberlayne, Sec. 3548;

Bryan v. Idaho Quartz Mining Co., 73 Cal. 249, 14 Pac. 859;

Smith v. Baer, 46 Ore. 143, 79 Pac. 497, 114 A. S. R. 858;

Swift v. Occidental L. & P. Co., 141 Cal. 161; 74 Pac. 700;

Williams v. Mt. Hood Ry. & Power Co., 57 Ore. 251, Ann. Cases 1913-A 177;

Ruckman v. Imbler Lbr. Co., 42 Ore. 231;

Colvin v. Goff, 82 Ore. 314, L. R. A. 1917 C, 300, 161 Pac. 568;

Jones on "Evidence", Vol. 3, Sec. 494;
Dollar v. International Corporation, 13 Cal. App. 331, 109 Pac. 499.

In an action on a promissory note, it cannot be shown by parol that the note was intended merely as a memorandum and was to be paid only on a contingency.

Wilson v. Wilson, 26 Ore. 251 (by Judge Wolverton).

In *Nickell v. Bradshaw,* (Oregon) 183 Pac. 13, decided July 29, 1919, by Judge Harris, the Court, on page 19 says:

> "In the last analysis the contention of the respondent is only an effort to vary and contradict the written contract of endorsement, and hence the parol testimony relating to any contemporaneous oral agreement was incompetent."

The rule inhibiting parol evidence to vary a writing applies particularly to negotiable paper.

Smith v. Caro & Bonne, 9 Ore. 278.

Varying Parties to Instrument.

> "By engaging to pay a particular person, the maker acknowledges his capacity to receive the money and his capacity to order it paid to another."

Sec. 5893, *Lord's Oregon Laws.*

> "It has been held that parol evidence will not be admitted to show that the real parties to an instrument are other than those whose names appear in or are signed thereto."

Gill v. General Electric Co., 129 Fed. 349;
Ferguson v. McBean, 91 Cal. 63.

Sec. 713, *Lord's Oregon Laws,* provides as follows:

Parol Evidence—Oregon Statute, Sec. 713, Oregon Laws: "EVIDENCE OF TERMS OF AGREEMENT REDUCED TO WRITING. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore, there can be between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is *put in issue by the pleadings:*

2. Where the *validity* of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties."

Section 714 of *Lord's Oregon Laws,* provides as follows:

"INTERPRETATION, BY LAW OF PLACE OF EXECUTION. The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place."

Section 1625, *Civil Code of California,* provides as follows:

"EFFECT OF WRITTEN CONTRACTS. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. (Amendment approved 1905; Stats. 1905, p. 611.)

Section 1647, *Civil Code of California,* provides as follows:

> "CONTRACTS EXPLAINED BY CIRCUMSTANCES. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

This section, to wit, 1647, does not modify the parol evidence rule. It is invoked only in cases where upon the face of the contract itself there is a doubt, and the evidence is used to dispel that doubt.

> *United Iron Works v. Outer H. etc. Co.,* 168 Calif. 81, 141 Pac. 917.

In the above entitled case, the Court well defined the rule, when it said:

> "The evidence (parol) is used to dispel that, not by showing that the particular parties meant something *other than* what they said, but by showing what they meant *by* what they said."

There is a great deal of difference between the admissibility of extrinsic evidence to *explain* that which is written and the admissibility of extrinsic evdence to *contradict* that which is written.

The Oregon statute set forth above, to wit, Sec. 713, is practically in the same language as Sec. 1647 of the California Civil Code, and should be interpreted in the same way.

Both statutes are but restatements of the common law.

There was no ambiguity in the ten notes introduced by plaintiff herein, and it was error to admit evidence of surrounding circumstances.

> *Abraham v. Oregon & C. R. Co.,* 37 Ore. 495;

82 *A. S. R.* 779, 64 L. R. A. 391, 60 Pac. 899;
Dunlap v. Lewis, 64 Ore. 482, 130 Pac. 973;
McConnell v. Gordon Const. Co., 105 Wash. 659, 178 P. 823;
Meyer v. Everett Pulp etc. Co., 193 Fed. 857, 113 C. C. A. 643 (9th Circuit).

In the above case, the Court approved the rule, which was stated in *Davis Calyx Drill Co. v. Mallory,* 137 Fed. 332, 69 L. R. A. 973, as follows:

> "Where the written contract of the parties is complete in itself, the conclusive legal presumption is that it embodies the entire engagement of the parties and the manner and extent of their obligations, so that parol evidence of other terms is inadmissible to extend, modify, or contradict it."

A Parol Agreement to Answer for the Default of Another Is Void.

All evidence brought by defendant to contradict the absolute promise of the notes, is oral,—and being oral is void.

Section 1624, *Civil Code of California,* provides as follows:

> "* * * 2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four;"

Section 808, *Lord's Oregon Laws,* provides as follows:

> 1. "In the following cases the agreement is *void* unless the same or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged, or by his lawfully authorized agent;

evidence, therefore, of the agreement shall not be received other than the writing or secondary evidence of its contents in the cases prescribed by law.

2. An agreement to answer for the debt, default, or miscarriage of another."

See, in support of the above, the following authorities:

Miller v. Lynch, 17 Ore. p. 61, 19 p. 845;
Gump v. Holberstadt, 15 Ore. p. 358, 15 p. 467;
Stearns on Suretyship, Sec. 35, p. 45, and
Jones on Evidence, Proof of Guaranty, Vol. 3, Sec. 427,

holding that all contracts of suretyship are within the statute of frauds.

Since the above Section 808 of the Oregon Laws provides that a contract to answer for the debt or default of another must be in writing, and that if it is not, the contract is *null and void,* it follows that if in the case at bar there was in fact any oral evidence, by which Goldthwaite had agreed to answer for the debt of Modoc Lumber Company, such contract would have been null and void. The plaintiff in this case could not have recovered on an oral contract of suretyship against the defendant, and conversely the defendant cannot use it as a defense, or prove a guaranty. Such contract in any event would be null and void and would be useless to either party. So, in addition to the fact there is no oral evidence in this case that the notes were suretyship notes, we have the further rule of law that suretyship of the notes cannot be proven by parol testimony.

POINT II.

ASSIGNMENT OF ERROR VII.

(Trans. p. 89.)

In addition to our contention that parol evidence was not admissible to contradict the absolute promise to pay the notes described as Plaintiff's Exhibits 1 to 10 inclusive, we further contend that the Court erred in considering the said parol evidence, and in making it the basis of a finding which is in conflict with, and varies the notes sued upon.

In *Dollar v. International Banking Corporation,* (Cal.) 109 Pac. on page 504, the Court said:

> "* * * but parol evidence would neither be admissible to vary this contract, nor, if admitted without objection, be sufficient to support a finding which was in conflict with or which in any manner varied the original contract which the parties entered into."

In its decision, the Court states that there was no debt owing Macomber from Goldthwaite, and therefore, there was no consideration for the notes. (Trans. p. 92.) We contend that the Court erred in this matter of consideration,—as the consideration that Goldthwaite received from Macomber was injury to his stockholder's interest in the Macomber-Savidge Lumber Company through—

(1) Postponing the due date of Modoc Lumber Company's account to the Macomber-Savidge Lumber Company.

(2) Allowing Menefee's indebtedness to be a preferred lien over the claim of the Macomber-Savidge Lumber Company filed with the Board of Trade.

(3) By allowing the other creditors to share in the lien of the second mortgage of the Board of Trade.

(4) By allowing the balance of $18,000.00 still due the Macomber-Savidge Lumber Company after dividing and filing its claim, to wit, $18,000.00 to be postponed as to security and sharing in the assets of the Modoc Lumber Company.

(5) By preserving to defendant this equity in the assets of the Modoc Lumber Company, resulting in the end in Goldthwaite realizing the sum of about $196,000.00,—which would have been entirely lost to him had he not obtained the consent of Macomber to the trustee filing the claim of the Macomber-Savidge Lumber Company. Through this consent Mr. Macomber sustained great individual loss to his stock interests, and Mr. Goldthwaite received great individual benefits.

The above constituted a fair and full consideration for the $50,000.00 in notes, which had the most remote chance of ever being realized upon at the time they were executed.

POINT III.

ASSIGNMENTS OF ERRORS VIII TO X INCLUSIVE.

(Trans. pp. 93 to 95 inc.)

The above assignments cover the question as to whether the testimony in the case shows any evidence of suretyship, and will be discussed together as one point.

The principal contention of defendant is that the Goldthwaite notes are collateral surety or guaranty notes and that they have been satisfied by what defendant contends is the payment of what he terms the primary obligation, meaning the $53,905.92 claim of

the Macomber-Savidge Lumber Company. We contend, on the contrary, that the Goldthwaite notes of $50,000.00 themselves are the principal obligation. The notes themselves are, of course, absolute promises to pay, and are in no way conditional upon the payment of a claimed principal obligation, but are themselves the principal obligation. This being the case, it is necessary for defendant to show by something outside of the notes themselves, that said notes were surety notes. Outside of the notes, there are only two factors to be considered, to wit, the oral conversation between plaintiff and defendant at or immediately prior to the time of the execution of the notes, and defendant's Exhibit B (Trans. p. 113), to wit, the personal agreement between plaintiff and defendant.

There is not a word in all of the evidence of such an oral conversation or agreement as to suretyship. On the contrary, the testimony of *Goldthwaite himself* is that the notes that he gave to Macomber *were not discussed at all.* In reply to a question of the Court on cross-examination, the following testimony was given by Goldthwaite:

> "COURT. Q. Why were these notes made for $5,000.00 each, and distributed over the length of time for payment?
> A. Yes.
> Q. I say, why was that done?
> A. I don't know—that was Macomber's notion. *We never discussed those notes at all.* He just presented them to me." (Trans. bottom of page 225 and page 226.)

It follows, therefore, from the foregoing statement of defendant that the notes *were not discussed* and

that the notes cannot be construed with any *oral* testimony to show a guaranty, for there is no such testimony. If the notes were not discussed, guarantyship or suretyship were certainly not mentioned.

During the course of Macomber's redirect examination, he testified that Goldthwaite knew he was not taking the notes for the company (Trans. page 135), and in response to the following question the following statements were made by counsel:

> "Q. Have you had any letters from him in regard——
>
> Mr. Veazie. May it please the Court, as far as that point is concerned there, I think we ought to object to it, as far as it attempts to vary *that writing, because that writing shows the basis on which taken.*
>
> Mr. Van Duyn. That is what we claim. If you want to stand on the writing we will both stand on it.
>
> Mr. Veazie. We will stand on the writing as far as it states the facts." (Trans. pages 135-136.)

This shows how counsel met on the question of varying the contract.

Is There Any Statement in the Instrument of February 28, 1922, That Shows Goldthwaite Notes Were Conditional Guarantees?

The question of parol evidence showing that the Goldthwaite notes were guarantees, having been disposed of, we have then only the question of whether there is anything in the written instrument of February 28, 1922, that shows the notes were guarantees.

We can find no statement therein that they were guarantees. The word "guarantee" or "suretyship" is not used. The substantial provision, so far as the

notes sued upon, is as to how credits shall be given upon the notes. What payments were to be applied upon the notes was the purpose and subject of the agreement. Had Goldthwaite intended these notes to be guarantees, it would have been easy to have said so in the personal agreement. Even a man of no experience, and of little education could have made clear that the notes were intended to be guarantees. That payments coming through the San Francisco Board of Trade, or through the Modoc Lumber Company, were to be credited on the notes does not constitute a guarantee. By agreement, a credit on payment, coming through any one, could have been credited. Such an agreement would constitute no guarantee. Goldthwaite evidently considered himself and the company as being practically one. It made no difference to him whether the company paid the notes, or whether he paid them himself. What money he got came from the company, and he would just as soon have the company pay for him as to have the company pay him, and then he to pay Macomber.

Had Goldthwaite, the maker of the notes, and Macomber, the payee of the notes, intended to make Goldthwaite a surety to the $53,905.92 claim filed with the San Francisco Board of Trade, they both being business men of experience, would either have expressly stated in the personal agreement that the notes were only guarantee notes or *else they would have had the Modoc Lumber Company make its notes payable to Sanborn, trustee of the Macomber-Savidge Lumber Company, and Goldthwaite would have endorsed the notes on the back as a surety.* Certainly

no person of intelligence would have undertaken by a devious, intricate and uncertain method, as is attempted by defendant, to be asserted here to formulate a guarantee. Only a person endeavoring to escape a liability, and looking for a hole to crawl through could read into the personal written agreement anything in the nature of a guaranty.

Defendant claims the notes were sureties to the Board of Trade's notes $53,905.92. Why then did not Goldthwaite on February 28 and March 1, 1922, make his notes payable at the same time and in the same amount? Why did he spread the maturity of his notes over a period of thirty odd months? Why make them bear interest? Why place these negotiable instruments in the hands of Macomber, who could have transferred them before maturity, and thus subjected Goldthwaite to pay them without the right of making the defense of suretyship?

We hold that a shrewd business man, like Goldthwaite, would have never done such an unbusinesslike act if he had not intended these notes to be, just what on their face they purport to be, unconditional and absolute obligations to pay a certain sum at certain times. Certainly he is presumed to have intended the natural consequences of his acts.

Goldthwaite's promises to pay Macomber, as evidenced by the notes, were not collateral promises and without consideration. There is a marked difference between a promise which, without any interest in the subject matter of the promise in the promissor, might be collateral to the obligation of a third party, and

that which though operating upon the debt of a third party is also and mainly for the benefit of the promissor. Goldthwaite acknowledges that he was practically the Modoc Lumber Company—its interests were his interests—any benefit to the Modoc Lumber Company inured equally to the interest of Goldthwaite. Goldthwaite's promises, in the promissory notes sued on, were not collateral undertakings to secure the promises of the Modoc Lumber Company, but direct and personal ones to advance his own interests. He was a real and substantial party in interest to the performance of the contract. While the Modoc Lumber Company might be ultimately benefited by Goldthwaite signing the notes, Goldthwaite was primarily to be benefited—for the Modoc Lumber Company was but the pocket and conduit from which he derived his profits and assets. He is an original promissor—not a collateral undertaker.

The defendant contends and pleads that the notes here in suit were paid or discharged and the alleged limited guarantee which they constituted, released, when the notes of the San Francisco Board of Trade which had been purchased by Menefee from it in 1924, for thirty cents (30¢) on the dollar, were paid by the Modoc Lumber Company in full to the L. B. Menefee Investment Company, the then owner of the San Francisco Board of Trade notes of $178,592.77, on the 14th day of July, 1925. (See Paragraphs XIV and XV of Defendant's Amended Answer.)

In this connection, it will be noted that none of the money which defendant claims discharged and paid the Macomber ten notes here in suit, was received by

the San Francisco Board of Trade or by Sanborn, the trustee, in liquidation of the Macomber-Savidge Lumber Company, from the Modoc Lumber Company. It was all received by the L. B. Menefee Investment Company some two years after the San Francisco Board of Trade had sold the note of $178,592.77 to the L. B. Menefee Investment Company for thirty cents (30¢) on the dollar, which thirty cents, amounting to $16,500.00, was all the Macomber-Savidge Lumber Company ever got on its indebtedness or claim of $53,905.92. Defendant, in his oral argument in the Court below said he did not claim that the sale of the San Francisco Board of Trade notes to Menefee paid or discharged the notes sued on, but that the sale of July 14, 1925—all of the moneys of which were received and kept by Menefee and Goldthwaite—discharged the Goldthwaite notes, and that although nothing was received by the Macomber-Savidge Lumber Company, nevertheless, such transaction should be regarded as a payment.

Therefore, the only payment made "*through the San Francisco Board of Trade*", which, Macomber in the letter of February 28, 1922, agreed "to apply against the personal notes given to me (Macomber) by you (Goldthwaite) to the amount of said notes" was this thirty cents (30¢) on the dollar, or $16,500.00.

There remains but one other consideration for our determination in this matter. It is this—What payments "*made by the Modoc Lumber Company direct*" were "*to apply* against these ten personal notes given by the defendant to the plaintiff"?

Now, what was the subject of the agreement between Macomber and Goldthwaite as set out in the

letter of February 28, 1922? It was "our personal agreement" in connection with the claim of the Modoc Lumber Company, and the personal notes of Goldthwaite, and what payments made by the Modoc Lumber Company, *either direct or through the San Francisco Board of Trade* were to apply against the *personal* notes given by Goldthwaite to Macomber.

Direct payments made by the Modoc Lumber Company to whom? Surely to the only one that had any claim at that time—the Macomber-Savidge Lumber Company, or its trustee in liquidation—Sanborn—and over which only the parties were negotiating for the purpose of applying credits on the Goldthwaite personal notes.

How could the parties to this agreement have had any other idea in their minds. A consideration of the circumstances under which the agreement was made and the matter to which it relates, can lead to no other conclusion than that the parties had in mind only money payments to be made *directly to* the Macomber-Savidge Lumber Co. or to its trustee, Sanborn, because at the time it was made these were the only persons or obligations in which any direct payments could have been made. The Board of Trade note of one hundred seventy-eight thousand ($178,000.00) dollars did not come into existence until June 16, 1922, some three and one-half months after this agreement of February 28, 1922, was made, and it was then not certain that it would ever come into existence, and the Macomber-Savidge Lumber Co. claim represented only a part of it.

This conclusion is inescapable when we consider the testimony at the trial, of defendant Goldthwaite that he then expected (February 28, 1922) to pay out through the profits derived from the operation of the mill of the Modoc Lumber Company the indebtedness of the Macomber-Savidge Lumber Company and his other creditors. (Trans. page 277.)

This testimony clearly shows that Goldthwaite only had in mind when he made the personal written agreement of February 28, 1922, with Macomber that the only direct payments to be credited on the ten personal notes here in suit, were money payments to be made directly by the Modoc Lumber Company to the Macomber-Savidge Lumber Company, or its trustee, Sanborn,—not payments made by the Modoc Lumber Company on notes given by it to the San Francisco Board of Trade months afterward, which notes were by the Board of Trade sold to the L. B. Menefee Investment Company in 1924 for thirty cents on the dollar and paid by the Modoc Lumber Company to the Menefee Investment Company in 1925, not one cent of which latter payment was ever received by the Macomber-Savidge Lumber Company, or its trustee, Sanborn.

How could he have had in mind on February 21, 1922, that through a sale made in July, 1925, the Modoc Lumber Company was to directly pay its indebtedness to the Macomber-Savidge Lumber Company. The mere statement of the proposition shows its absurdity.

Finally the claim referred to in the contract of February 28, 1922, between Goldthwaite and Macomber was the then existing claim of the Macomber-

Savidge Lumber Company against the Modoc Lumber Company not the notes to the Board of Trade that came into existence over three months later.

These notes at the date of their issuance, therefore, did not belong to the Macomber-Savidge Lumber Company, but to the San Francisco Board of Trade, and the 110 creditors were only beneficially interested in them to the extent of the amounts of their respective claims—the Macomber-Savidge Lumber Company's beneficial interest therein being only fifty-three thousand ($53,000.00) dollars, or thereabouts. On February 28, 1922, plaintiff and defendant could not refer to payment by the Modoc Lumber Company to the Board of Trade, or to Menefee.

Now after the Board of Trade sold these notes to the Menefee Investment Company, neither the Macomber-Savidge Lumber Company, Sanborn, its trustee, or the San Francisco Board of Trade had any claim against the Modoc Lumber Company. The ownership of the claim passed to the Menefee Investment Company, and from the date of the transfer the Menefee Investment Company was the only one who had any claim on these notes against the Modoc Lumber Company. It, therefore, follows that when in July, 1925, the Modoc Lumber Company paid the Board of Trade notes to the Menefee Investment Company, it was not paying any claim of the Macomber-Savidge Lumber Company, but the debt owed to the Menefee Investment Company by the Modoc Lumber Company.

The Court erred in finding that Macomber gave no consideration for the notes. We refer to our brief in

the foregoing point III as to our position on this point.

POINT IV.

ASSIGNMENT OF ERROR XI.

(Trans. p. 96.)

In paragraph V, of Plaintiff's Reply (Trans. p. 44) plaintiff alleged the assignment of the assets of the Macomber-Savidge Lumber Company to Crittenden, as trustee. This was an issue, and a material one, since it would show that on the date of signing and executing Defendant's Exhibit B—(the personal contract) and the notes, that plaintiff had no authority to make a contract with Goldthwaite for his company. Evidence was introduced upon this point. (Trans. pp. 153, 210, 212, 213.)

The Court should find on every material issue in the case.

Pon v. Wittman, 147 Cal. 280, 81 Pac. 984.

POINT V.

ASSIGNMENT OF ERROR XII.

(Trans. pp. 97, 98.)

The Court erred in making the conclusions of law set forth in Assignment XII, in that the said conclusions are insufficient to justify the findings, by reason of the fact that there is no finding that sets forth that an amount equal to the total of the notes given to the Board of Trade by the Modoc Lumber Co., has been paid. There is no allegation in defendants

pleading or proof supporting the same, that there was no consideration to him from plaintiff for the execution, and no allegation that the consideration alleged in defendant's affirmative defense was the sole consideration. The said finding of the Court is without foundation on evidence and erroneous, and the conclusion of law based upon it is therefore without sufficient support.

POINT VI.

ASSIGNMENT OF ERROR XIII.

(Trans. p. 98.)

The judgment based upon the finding based upon the assigned errors in admission and consideration of evidence, findings of facts, and conclusions of law is erroneous in that it based the said errors so assigned. The reasons why said judgment should be held erroneous, are set forth hereinbefore, and they are hereby referred to and made a part of this subdivision.

We respectfully contend that the judgment should be reversed.

Dated, San Francisco,
August 17, 1927.

WALTER S. BRANN,
O. M. VAN DUYN,
BRANN, VAN DUYN, BOEKEL & ROWE,
Attorneys for Plaintiff in Error.

No. 2989

In the United States Circuit Court of Appeals

For the Ninth Circuit

F. B. MACOMBER,
Plaintiff in Error,

vs.

J. O. GOLDTHWAITE,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

VEAZIE & VEAZIE,
Attorneys for Defendant in Error.

No. 2883

In the United States Circuit Court of Appeals

For the Ninth Circuit

F. B. MACOMBER,
Plaintiff in Error,

vs.

J. O. GOLDTHWAITE,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

OPENING STATEMENT.

The opening statement of the plaintiff in error fails to state the issues of fact which were presented by the pleadings, and in the place of the facts as found by the Court and as they are shown by the evidence it puts forward as the facts of the case the ill founded and unsupported theories of plaintiff's counsel respecting several important points, in par-

ticular as to the supposed effect of the Crittenden agreement and as to what the consideration for the notes was. We, therefore, deem it necessary to make an additional opening statement, and to point out some of the errors in the one submitted by the plaintiff.

This is an action at law brought in the District Court for Oregon by the plaintiff, a citizen and resident of California, against the defendant, who was when the case was begun a citizen and resident of Oregon, to recover balances claimed to be due on ten promisory notes, each for $5000, alleged to have been given by the defendant to the plaintiff on March 1, 1922. The answer admits that notes in the form set forth were made by defendant, but denies that same were made or delivered except as in the answer affirmatively alleged, and denies each and every allegation of the amended complaint respecting the making of the notes except as affirmatively alleged in the answer. In his affirmative answer the defendant states as follows:

That at the time the notes were given and for a long time prior thereto, plaintiff was president and one of the principal stockholders of the Macomber-Savidge Lumber Company, and defendant was president and principal stockholder of the Modoc Lumber Company; that the latter company had become indebted to the former company in an amount around $50,000; that both companies were financially embarrassed, the Macomber - Savidge

Lumber Company having assigned its property to a trustee named Sanborn for the benefit of certain of its creditors, and the Modoc Lumber Company's creditors having placed their claims in the hands of the Board of Trade of San Francisco; that the Modoc Lumber Company was endeavoring to refinance its affairs by obtaining new capital through a first mortgage loan of $250,000, and by inducing all its creditors to place their claims in the hands of the Board of Trade and to grant an extension of time, the payment thereof to be secured by a second mortgage; that the prospective first mortgage lender required that the second mortgage should not exceed a certain specified sum; that the amount of the indebtedness of the Modoc Lumber Company to the Macomber - Savidge Lumber Company was in dispute; that in order to keep the second mortgage within the limit required, it was necessary that the claim of the Macomber-Savidge Lumber Company to be included therein should not exceed $54,000; that to obtain this concession the Modoc Lumber Company and the defendant on the one part agreed with the Macomber-Savidge Lumber Company and the plaintiff on the other part, that the Macomber - Savidge Lumber Company should present and assign its claim to the Board of Trade of San Francisco for inclusion in the second mortgage or other form of funded indebtedness in the amount of only $53,905.92, and that in consideration thereof the Modoc Lumber Company should approve the claim of the Macomber-Savidge

Lumber Company as stated by it, and in addition thereto that the defendant should guarantee the payment of part of said claim, to-wit: to the amount of $50,000, by giving the promissory notes described in the amended complaint, on the understanding that the portion of said claim turned over to the Board of Trade of San Francisco should be converted into notes or other evidence of indebtedness, signed by the Modoc Lumber Company and its subsidiary corporation, the Williamson River Logging Company, and secured by a second mortgage, or some form of lien on the properties of the two companies; and that any and all payments made on any part of said indebtedness of the Modoc Lumber Company should be credited against the said personal notes to be given by the defendant as a guaranty, up to the amount of defendant's said notes; that said ten promissory notes described in the amended complaint were each and all made, given and delivered by the defendant, and taken, accepted and received by the plaintiff, for the use and benefit of and as agent for the Macomber-Savidge Lumber Company, solely on the consideration aforesaid, and on the agreement and understanding between the parties to said notes, had and entered into at the same time the notes were given, that defendant should thereby become bound as surety and guarantor for the Modoc Lumber Company up to the amount of $50,000 for the payment of said indebtedness then existing and owing from the last named company, to the Macomber-Savidge

Lumber Company, as above set forth, and not otherwise; that the said contemplated arrangement was carried out; that the claim of the Macomber-Savidge Lumber Company in the reduced amount of $53,905.92 was assigned to the Board of Trade and converted into notes secured by a second mortgage; that these notes were afterwards sold by the Board of Trade and later were paid off in full; and that thereby the defendant has been discharged from liability on the notes sued on, which were collateral to the said indebtedness of the Modoc Lumber Company.

The case was tried by the Court without a jury, on written stipulation of the parties. The Court below found the facts to be substantially as alleged in the answer (Transcript, p. 61), and gave judgment for defendant. The case is brought here on writ of error by the plaintiff.

No request or motion was made by the plaintiff in the court below for any findings of fact, either general or special, nor was any point of law submitted by plaintiff for the ruling of the court, save by certain objections to testimony, which will be discussed later. No exceptions were taken to any of the findings of fact or conclusions of law as made. No question is raised on this appeal as to the sufficiency of the facts found to sustain the judgment. The assignments of error, with the exception of two or three respecting admission of testimony, are based on matters to which no ex-

ceptions were taken in the lower court, and which this court therefore has no jurisdiction to consider.

We call attention now to certain details in which the statement of facts made by the plaintiff in his brief needs correction. A labored effort is evident therein to have it appear that the plaintiff had ceased, on and after the 14th of December, 1921, the date of the Crittenden agreement, to act as president and director of the Macomber-Savidge Lumber Company. The purpose of this is to escape from the presumption that in taking security related to a debt due his company, the plaintiff acted in the company's interest and not in his own personal interest, and also to escape from the rule that an officer of a corporation can not bargain away his company's rights for a consideration personal to himself. The court is therefore told by the plaintiff in the first sentence of his opening statement that the plaintiff "up to the 14th day of December, 1921, was president and director of the Macomber-Savidge Lumber Company", and a large part of the brief is devoted to the nursing of the idea that because of the Crittenden agreement the plaintiff could not after the 14th of December, 1921, take any action for the protection of the interests of his corporation, but that he could and did bargain away those interests for his own personal benefit.

It is admitted in the pleadings, being alleged in paragraph I of the answer to the amended complaint (Transcript, p. 28) and not denied in the re-

ply thereto (Transcript, p. 40) that at the time of all the transactions involved in this action, the plaintiff was the president of the Macomber-Savidge Lumber Company. It is undisputable that the plaintiff did go on doing business for his corporation and acting as its president long after the 14th day of December, 1921. The lower court has found (Transcript, p. 51), not only that the plaintiff was president of his company at all times mentioned in the pleadings, but that he acted in behalf of his company in this very transaction, and no exception has been taken by plaintiff to this finding. The evidence that plaintiff continued to act on behalf of his corporation as its president and managing officer up until long after the execution of the notes in question is abundant and is uncontradicted except by some feeble pretensions on his part that he conducted himself according to the terms of the Crittenden agreement. Inasmuch as the fact has been found in our favor on this point by the lower court, and is not here for review, we refrain from discussing in detail the evidence in relation thereto.

It is also repeatedly stated in plaintiff's brief that the notes in question were given to plaintiff in consideration of his own individual consent to the reduction of his company's claim and the filing of same with the Board of Trade. This statement is not only contrary to the findings of the lower court (Findings VI and VII, Transcript, pp. 64-66) to which no exceptions were taken, but is contrary to the evidence and absurd on its face. We do not

deem it necessary or proper to discuss the evidence in detail. It suffices to say that nobody—not even the plaintiff himself—so testified.

The plaintiff is largely staking this appeal on the theory that the Crittenden agreement completely barred him from acting on his company's behalf in respect to any of its affairs. The Macomber-Savidge Lumber Company was not a party to that agreement, which was merely a private arrangement between the stockholders. The company made no transfer of its assets to Crittenden, and he never became vested with any title thereto. The Crittenden agreement was cancelled and superseded by a new agreement to which the corporation was a party (Defendant's Exhibit No. 12, Transcript, pp. 326, 330) on February 21, 1922. The new agreement was not and did not purport to be a continuation of the Crittenden agreement, but completely superseded same. The provision contained in the Crittenden agreement forbidding the compromising of any claims without the written consent of Macomber and Savidge is not contained in the Sanborn assignment. Even if it were therein, it would have no such effect as is contended for by plaintiff, but would render it more rather than less obligatory on him to represent faithfully the interests of his company, inasmuch as it designated him as one of the two officers and directors who were to supervise the liquidation of its affairs through the trustee.

It is assumed all through plaintiff's statement

of the case that Goldthwaite was dealing with Macomber on the basis of the Crittenden agreement, although Goldthwaite has testified (p. 212) that he knew nothing of its terms, and the Crittenden agreement had been annulled at the time the dealings took place.

We shall show hereafter in this brief that if the notes were given for Macomber's individual benefit and the consideration was what he claims it was, they were void for illegality of consideration.

Before taking up the assignments of error on the merits excepting in an incidental way, we propose now to show by a preliminary discussion thereof that none of them, outside of the first, second and fourth assignments, are founded on any exceptions taken below; and these three are stuffed with matter which does not come under the objections and exceptions on which they rest. The plaintiff in error has therefore no substantial basis for the review he is seeking to obtain, unless it can be found in that part of assignments numbered I, II and IV which legitimately comes under the exceptions on which these three assignments rest.

PRELIMINARY DISCUSSION OF THE ASSIGNMENTS OF ERROR.

The first assignment is founded on the action of the court, as shown in the bill of exceptions at page 120 of the transcript, reference to which will show that the objection and exception cover just

one specific question, namely, whether immediately before the notes sued on were signed, there was any argument between plaintiff and defendant, or difference, as to whether the Macomber-Savidge Lumber Company would put its claim into the hands of the Board of Trade or not. The court permitted the question to be answered, reserving a ruling on the objection until after the evidence was in. No motion to strike or other later effort to obtain a ruling is shown. Plaintiff in fact appears to have evaded that particular question and never answered it. His counsel in their assignment based thereon have run into the record matter testified to in answer to other questions which were not objected to and which did not refer to any conversations between the parties and were not in any sense within the scope of the objection. Such loose and general exceptions and assignments of error based thereon are insufficient to secure a review of the action of the lower court. Questions of law, which were not presented to the lower court and sharply called to its attention by exceptions properly preserved in the record, are not open to review, and an exception which is too general and indefinite to challenge the attention of the trial court to any specific question of law involved in the case will not invoke the exercise of the appellate jurisdiction. Highway Trailer Co. v. City of Des Moines, Iowa, 298 Fed. Rep. 71. Wear v. Imperial Window Glass Co., 224 Fed. Rep. 60. An objection and exception on a specific point do not give a party carte blanche to

go into the entire record and assign as coming thereunder everything he may select.

The second assignment of error is founded on what appears in the bill of exceptions at page 145 of the transcript. The only answer called for by the question objected to was whether at the time plaintiff and defendant had the negotiations which led, among other things, to the adjustment of the account between their respective corporations, the plaintiff raised any question as to whether he was then acting for his corporation or for himself personally. The plaintiff, in assigning error on the overruling of his objection to the question, has attempted to run in under the objection extraneous matter not testified to in response to that question and pertaining to entirely different subjects. The same situation exists respecting several of the other assignments of error. As a matter of course, assignments of error must be based on exceptions taken to rulings at the trial. Ritz Carlton Restaurant & Hotel Co. v. Gillespie, 1 Fed. Rep. (2d) 921. Borderland Coal Sales Co. v. Imperial Coal Sales Co., 7 Fed. Rep. (2d) 116. Texas Co. v. Brilliant Mfg. Co., 2 Fed. Rep. (2d) 1. Northwest Theatres Co. vs. Hanson, 4 Fed. Rep. (2d) 471. An assignment of error to the ruling of the trial court does not dispense with the necessity of an exception. Goldfarb v. Keener, 263 Fed. Rep. 356. Under U. S. Stat. Sec. 700, the Circuit Court of Appeals is without jurisdiction to review rulings made on trial of an action of law by the court, unless they were

excepted to at the time. U. S. Shipping Board Emergency Fleet Corp. v. Drew, 288 Fed. Rep. 374. We will not extend our brief with further citations on a point so elementary and well settled.

The question, objection, ruling and answer, as shown at pp. 145-149, are as follows:

> Q. At the meeting when you agreed to approve the account on behalf of your company, was Mr. Macomber making any question as to whether he represented his company or himself personally?
>
> MR. VAN DUYN: We object as incompetent, irrelevant and immaterial, and as parol testimony intended to vary an agreement which was reduced to writing.
>
> COURT: It will be admitted subject to that objection.
>
> MR. VAN DUYN: May we have an exception to questions of like kind, as I understand it—the same ruling and exception?
>
> COURT: Yes.
>
> A. Will you give me the question?
>
> Q. (Question read.)
>
> A. There was no such question.

The testimony called for was competent, relevant and material and had not the slightest tendency to vary the written agreement. The plaintiff was endeavoring to maintain the position in the lower court, as he is attempting to do here, that when he had the transactions with defendant which resulted in the giving of the notes in question, he,

the plaintiff, was not acting on behalf of the Macomber-Savidge Lumber Co. but was acting only on behalf of himself individually. The answer alleged, in paragraphs VI and VII (Transcript, pp. 32 and 33) that plaintiff in said transaction acted on behalf of his company. These allegations were denied in paragraphs VI and VII of the reply (Transcript, pp. 47-49). Plaintiff had further alleged affirmatively in the reply that the Macomber-Savidge Lumber Company did not make any agreement whatsoever with the Modoc Lumber Company or the defendant at said time. When on the stand as a witness on his own behalf at the opening of the trial, plaintiff had testified (Transcript, p. 114) that the indebtedness of the Macomber-Savidge Lumber Company mentioned in Exhibit B, was the indebtedness of the Modoc Lumber Company to the Macomber-Savidge Lumber Company that existed on the date the notes were signed, and that at the same time plaintiff came to some agreement concerning the amount of that indebtedness with Mr. Goldthwaite on behalf of plaintiff's company. After making this statement, he had endeavored to back up on the matter by saying:

> I did not represent my company officially; I represented myself alone; nobody represented the company in making the agreement. My company did not come to any adjustment with the Modoc Lumber Company as to the amount of the account at this time. The arrangement that was made was not an agreement between

> the two companies at all. At the time I presume I was president of the Macomber-Savidge Lumber Company, but I don't know whether I was or not.

He then went on to set up the claim that the Crittenden agreement barred him from doing any business on behalf of his company, though he had to admit doing a number of specific acts on its behalf when confronted with writings and other evidence. Plaintiff had put the Crittenden agreement in evidence as an exhibit (Plaintiff's Exhibit 11, Transcript p. 127) and, as shown at page 134 of the transcript, his counsel had called attention to the provision therein that none of the parties to the agreement should transact any business on behalf of the corporation, and plaintiff had testified that he had conducted himself in accordance therewith. Surely the defendant had a right to dispute this testimony and to testify on the same point. We grant that the position of the plaintiff was so absurd as scarcely to need any evidence to contradict it, when he said that in obtaining a written approval of his company's account (Defendant's Exhibit B, Transcript, p. 113) he did not act on behalf of his company but represented himself only and that no one acted on behalf of his company. The natural presumption of Mr. Goldthwaite or any one else in negotiating such a settlement of the account would be that the president of each company was acting on behalf of his company and assuming to have authority to do so. Under such circumstances, if

plaintiff desired to disclaim authority to bind his company, it was the plain duty to put the other side on notice and to say that he had no authority and was merely acting on his own behalf. The question put to Mr. Goldthwaite and objected to by plaintiff was intended to elicit Mr. Goldthwaite's testimony as to whether the plaintiff had at the said time raised any question as to whether he was acting for his corporation or for himself personally, and the answer was that he had not. We think we are justified in saying that there was no merit in the objection ~~even if there had been an exception to the ruling.~~

The third assignment of error is founded on the action of the court appearing in the bill of exceptions at page 152 of the transcript. It is to be noted that no exception was taken to the ruling. Indeed, plaintiff did not even ask for or obtain a ruling, let alone an exception. The question objected to was a question put to defendant as to whether at the time the notes were signed, defendant had any dicussion with plaintiff concerning them. Plaintiff asked the court that the evidence called for should be considered as objected to, on the ground that same tended to vary the written contract, and the court assented. There is no suggestion of an exception. In the case of Felton v. Newport, 92 Fed. Rep. 470, it was held that an assignment of error will not lie upon the admission of testimony, unless the ruling is excepted to; and that where evidence is admitted subject to

objection made, and no exception is taken at the time, the matter must be again called up and a final ruling obtained, and an exception taken thereto. This holding is squarely in point and what has been said above in the discussion of the second assignment of error respecting the necessity of an exception to the ruling if it is to be assigned as error, also applies here.

Even if there had been a ruling and an exception, we are satisfied it would be held by the court that the objection was without merit. We will discuss the point later.

The action of the court on which the fourth assignment is founded appears in the bill of exceptions at page 153 of the transcript. Just prior to the putting of the question which was objected to, the defendant had testified that at the time the notes were presented for his signature, he protested that they should run to the Macomber-Savidge Lumber Company, because the indebtedness was to that company, and that in response thereto, plaintiff had said he was having trouble with his associates and was distrustful of the assignee and that he desired if possible to have the notes in his own name, in case any trouble arose in the future, so that he would have the whip hand or dominate the situation within his own company; and that he, defendant, did not owe plaintiff personally any money and plaintiff had never loaned him any money. With the foregoing as a preface, and with the written

contract, Defendant's Exhibit B, in evidence, in which it was stipulated that any payments made on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company were to be credited on the notes of Goldthwaite to Macomber, the following took place, forming the basis of plaintiff's fourth assignment of error, as set forth in the Transcript at p. 153:

> Q. Was there any other consideration given to you for the execution of these notes than you have set forth in your answer?
>
> MR. VAN DUYN: No failure of consideration pleaded at all.
>
> MR. VEAZIE: We pleaded exactly what the consideration was, and I simply asked him if there was any other consideration.
>
> A. None whatever; no, sir.
>
> MR. VAN DUYN: Objected to upon the ground that it has not been pleaded in the answer or further defense of the defendant, and varies the contract.
>
> COURT: Admitted subject to that objection and exception.
>
> Q. Under these circumstances you then signed the notes which are in evidence.
>
> A. Yes.

The objection that what was alleged in the answer was not pleaded is too nonsensical to discuss. We will comment later on the contention that proof of the consideration is to be excluded because it varies the written contract.

The fifth assignment is not founded on any particular objections and exceptions not already covered by preceding assignments. Much of the matter referred to therein as alleged error was brought out by the plaintiff's own counsel on cross examination of the defendant, as shown at pages 206 to 230 of the transcript. It is a sham assignment, founded on no objection, ruling of the court or exception, unless a part of it finds support in the same matter covered by assignment number IV. It requires no separate discussion.

The sixth assignment is not founded on any objection or exception. No such exception as counsel have imagined in drawing up this assignment, either to the testimony of Mr. Goldthwaite or of Mr. Brainard, as to the transactions had before the Board of Trade, or as to the evidence showing the payment of the notes and mortgages was ever interposed. The testimony on these points all came in without any objection thereto, and much of it in response to cross-examination by plaintiff's counsel. This assignment may therefore be eliminated from further consideration.

The seventh assignment is a blanket one, alleging error of the court in stating the law of the case as set forth in the written opinion. No exception thereto was taken. Even if an exception had been noted, it is settled law that assignments of error cannot be based on the opinion of the court below.

Stoffregen v. Moore, 271 Fed. Rep. 680.
Gibson v. Luther, 196 Fed. Rep. 203.

Fleischmann Const. Co. v. U. S., 270 U. S. 349, 46 S. Ct. 284.

In addition to the above good reasons why this assignment of error should be disregarded, we expect to show, in the discussion which will follow, that the view of the lower court as to the law, set forth in the opinion, is correct.

The eighth assignment is not founded on anything in the bill of exceptions, but is based on the contention that there is no evidence in the record to establish the facts set forth in the sixth finding of fact made by the lower court. As we have remarked above, the plaintiff made no request or motion for any findings, general or special, and took no exceptions to the findings which were made. Our contention is that he is not entitled to present for review here any question respecting the sufficiency of the evidence to sustain the findings which the court did make. In the case of H. F. Dangberg Land & Livestock Co. v. Day, 247 Fed. Rep. 477, the Court held that where, at the close of the testimony in an action tried to the Court, plaintiff made no request for a finding in its favor on the issues, and by no motion or request presented the question of law whether there was substantial evidence to sustain findings for defendant, the sufficiency of the evidence can not be reviewed on appeal.

In the case of Pabst Brewing Company v. E. Clemens Horst Co., 264 Fed. Rep. 909, the Court held that the sufficiency of the evidence to support

the trial court's findings is not open to review in the Circuit Court of Appeals, where there was no request for a contrary finding, and no motion or request presenting to the trial court the question of law whether there was substantial evidence to sustain the finding.

In the case of Security National Bank of Sioux City, Iowa, v. Old National Bank of Battle Creek, Mich., 241 Fed. Rep. 1, the Court said that the question whether there was any substantial evidence to sustain the findings, which is the only question as to the relation of the evidence to the findings reviewable by a Federal Appellate Court, can be reviewed only when, by motion, objection, or request for a declaration of law, or some like action, it was presented to and decided by the trial court,, and an exception to the ruling taken and allowed.

In the case of Highway Trailer Co. v. City of Des Moines, 298 Fed. Rep. 71, the Court held that in an action at law tried to the Court the question of law whether there is any substantial evidence to sustain a finding is reviewable only when a request or a motion is made, denied and exception taken, or some other like action is taken which fairly presents that question to the trial court, and secures its ruling thereon during the trial.

In the case of Fleischmann Const. Co. v. U. S., 270 U. S. 356, 46 S. Ct. 288, the court said:

> "To obtain a review by an appellate court of the conclusions of law, a party must either ob-

> tain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. Norris v. Jackson, supra, 129; Martinton v. Fairbanks, supra, 673 (5 S. Ct. 321). That is, as was said in Humphreys v. Third National Bank, supra, 855 (21 C. C. A. 542), "he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of the law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits."

Scores of additional cases could be cited to the same effect if it were deemed necessary.

Since the question as to whether there is any evidence to sustain finding number VI is not really before the Court, we are not disposed to burden the record with any extended reference to the testimony to show that the assignment would be without merit if the question were really here for consideration. Inasmuch as the plaintiff in error has discussed his three assignments numbered VIII to X inclusive collectively under point three of his brief, we will take them up in the same manner

later on and say what we think necessary respecting the evidence to sustain them.

The ninth assignment is in the same situation as the eighth, being based on finding number VII. It likewise rests on no ruling of the lower court, objection or exception.

The tenth assignment is in the same situation, being based on finding No. XV and not founded on any exception.

The eleventh assignment is based on the failure of the lower court to make a certain finding, to which plaintiff says he was entitled because of the allegations contained in paragraph V of the reply. The allegations of fact contained in paragraph V of the reply respecting the Crittenden assignment are immaterial, inasmuch as it appears therefrom that he had resigned and had been superseded by a new trustee before the notes in question were given. The matter alleged in assignment number XI as to the effect of the Crittenden agreement in depriving plaintiff of power to represent his company is not contained in the reply and is a mere illfounded conclusion of law. No motion or request was presented to the lower court to find these facts or draw the conclusion therefrom now contended for. The assignment therefore has no foundation in any exception or ruling. Even if there had been a special application to the court to make such a finding, compliance therewith would have been discretionary and a refusal would have constituted no reversible

error, granting that the finding was proper. Maryland Casualty Co. v. Orchard Land & Timber Co., 240 Fed. Rep. 366. Calaf v. Fernandez, 239 Fed. Rep. 795. U. S. v. Atchison T. & S. F. Ry. Co., 270 Fed. Rep. 1.

Counsel for plaintiff in error appear to be laboring under the idea that the practice in regard to findings and exceptions in the Federal Court is governed by the conformity statute, which is not so. Bank of Waterproof v. Fidelity & Dep. Co., 299 Fed. Rep. 478. Goldfarb v. Keener, 263 Fed. Rep. 356.

The twelfth assignment refers solely to the court's conclusions of law, and is not founded on any exception. In the case of Arkansas Anthracite Coal & Land Co. v. Stokes, 277 Fed. Rep. 625, it was held that where defendant made no request for findings or for any declaration of law in his favor, and saved no exception and took no other step prior to rendition of the judgment, the question of law as to the sufficiency of the evidence to sustain the findings is not open to review; it being too late, after the rendition of the judgment, to take exception to rulings of the court on the issues tried.

The thirteenth assignment is a blanket assignment founded on no exception and alleging error of the court in giving judgment for defendant. Even if there had been such an exception, it has been often held that it would present no question for review.

In the case of Arkansas Anthracite Coal & Land Co. v. Stokes, 277 Fed. Rep. 625, it was held that a general assignment that there was error in rendering judgment one way or the other is too indefinite for consideration on appeal.

In the case of Pennsylvania Casualty Co. v. Whiteway, 210 Fed. Rep. 783, it was held that where an action at law is tried to the court and a jury is waived, the court's general finding stands as the verdict of a jury and may not be reviewed, unless the lack of evidence to sustain the finding has been suggested by a ruling thereon or a motion for judgment, or some motion to present to the court the issue of law so involved before the close of the trial.

In the case of National Surety Co. v. United States, 200 Fed. Rep., 142, it was held that in the absence of any request to find a fact specially or to find generally for defendant, and a ruling thereon, and an exception taken, a general finding for plaintiff stands as the verdict of a jury, and an exception thereto presents no question for review.

In the case of Phoenix Securities Co. v. Dittmar, 224 Fed. Rep. 892, it was held that under Act March 3, 1865, c 86 Sec. 4, 13 Stat. 501, (Rev. St. Secs. 649, 700,—Comp. St. 1913, Secs. 1587, 1668) providing that the court's finding on the facts, where the case is submitted to it by written consent to waive a jury, shall have the effect of a verdict, and its rulings during the trial, excepted to at the time, may be reviewed, if presented by bill of exceptions, and

if the finding is special the sufficiency of the facts found to support the judgment may be reviewed, the general finding in such a case is not reviewable, except where there is no evidence to support it, and then only when the question was expressly presented to the trial court and exception saved to its ruling thereon.

In the case of Keeley v. Ophir Hill Consol. Mining Co., 169 Fed. Rep. 598 & 601 (two cases), it was held that an assignment that there was no evidence to support the judgment presents a question of law which cannot be reviewed unless presented to and passed on by the trial court by some appropriate action before the end of the trial.

In the case of Mound Valley Vitrified Brick Co. v. Mound Valley Natural Gas & Oil Co., 205 Fed. Rep. 147, it was held that where the parties to an action at law waive a jury and submit the issues of fact to the court, the court's general finding thereon cannot be reviewed; but questions sought to be reviewed must be presented to the trial court by requests for findings or declarations of law applicable to the evidence.

In the case of Calaf v. Fernandez, 239 Fed. Rep. 795, it was held that where, in such case, no request was made during the trial for special findings, nor any motion for a general finding in favor of the adverse party, there is no question in respect to the general finding that can be reviewed by an appellate court under Rev. St. Sec. 700 (Comp. St. 1915, Sec.

1668), which provides for a review in such case only of "the rulings of the court in the progress of the trial."

In the case of Bank of Waterproof v. Fidelity & Deposit Co. of Md., 299 Fed. Rep. 478, it was held that to secure review of evidence by appellate court in trial by court without jury under written stipulation waiving jury, appellant must have moved for judgment and excepted to court's refusal thereof; exception to judgment alone not presenting anything for review.

In the case of Granite Falls Bank v. Keyes, 277 Fed. Rep. 796, it was held that on trial of an action at law to the court, where no finding or ruling was asked on the conclusion of the evidence, assignments that the court erred in directing judgment for one party and in not directing judgment for the other present no question for review under Rev. St. Sec. 700 (Comp. St. Sec. 1668.)

In the case of United States v. Atchison T. & S. F. Ry. Co., 270 Fed. Rep. 1, it was held that general specifications that the court erred in entering judgment for defendant, or in failing to enter it for plaintiff, upon specified counts, but setting forth no specific issues of law or rulings thereon excepted to, which conditioned the entries or refusals to enter, are too indefinite for review.

In the case of United States Shipping Board Emergency Fleet Corporation v. Drew, 288 Fed. Rep. 374, it was held that assignments that the

court erred in rendering judgment for plaintiff and in not rendering judgment for defendant are too general to raise any question for review.

ANSWER TO ARGUMENT OF PLAINTIFF RESPECTING ASSIGNMENTS NUMBERED I TO VI INCLUSIVE:

We have shown by our analysis above that only the first, second and fourth assignments rests on any exceptions taken in the court below. As to the first assignment, we have shown that it rests on an exception and objection to a question which was not answered, and that the court had reserved a ruling until after the evidence was in, and was never called on to rule. For the reasons set forth in our said analysis, we contend that no substantial question is presented to the court by said assignment. The intent of the question objected to, as was stated to the court at the time, was merely to show the circumstances under which the notes and the written agreement, defendant's Ex. B, were executed and the situation of the subject matter and the parties; all of which matters it is expressly provided in Section 717 Oregon Laws may be shown. That section reads as follows:

> For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in

the position of those whose language he is to interpret.

This rule, about which there can be no controversy, entitled us to the admission of all of the evidence we put in respecting the circumstances surrounding the making of the notes. There were before the court for consideration the notes and the written agreement executed simultaneously therewith. To enable the court to interpret these instruments, we were entitled to show everything this section of the code says we may show. This embraced, of course, the relations between the parties and the companies they respectively represented, the facts as to the indebtedness, the dispute concerning the amount thereof and the adjustment they were making at the time, the arrangement contemplated with the Board of Trade—all these matters being expressly referred to in the writings themselves. It seems to us, that in a case like this, the rule cited is broad enough to admit also proof of what the actual consideration for the notes was, because the other matters we are plainly entitled to bring out thereunder can hardly be shown without bringing out the consideration for the notes at the same time.

At any rate, this section of the statute clearly entitled us to prove all the circumstances and relations of the parties existing at the time the notes and the agreement (Defendant's Exhibit B) executed simultaneously therewith were made.

The only testimony the plaintiff gave which can be deemed to have any relation to the question objected to was his statement as follows, appearing at page 121 of the Transcript:

> A. * * * I did not consent to the claim of the Macomber-Savidge Lumber Company being filed with the Board of Trade until after we had concluded our agreements and Goldthwaite had handed me the ten notes.
>
> Q. Wasn't it a part of the understanding that you would consent when the notes were signed?
>
> A. Yes, sir, that was the understanding. I consented for myself.

Plaintiff's counsel are hardly in a position to urge that this testimony is matter not proper for the consideration of the court, inasmuch as they have set out the same matter, tinged with their theory as to its interpretation, at pages 6 and 7 of their brief. If there was any error in the reception of the testimony—we think it is clear there was none—it would be cured by the admissions of plaintiff's counsel, made in their brief, respecting the facts.

The fourth assignment presents a more substantial question. Indeed, it appears to be the only assignment in the whole record which presents any real issue for the consideration of the court. The interrogatory objected to called for and elicited testimony as to what was the consideration for the notes.

Inasmuch as the uniform negotiable instruments law is, and was at the time of the transactions here involved, in effect in both Oregon and California, there is no question of conflict of laws on that subject; but as to matters of practice, such as the form of the pleadings and the reception of evidence, the laws of Oregon govern, as a matter of course.

Counsel for plaintiff are in grievous error in saying to the Court that the only defense pleaded is that the notes were given as collateral security to the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, and were discharged by the payment thereof. That is one defense. Another defense is that if the notes really were given to the plaintiff for his personal benefit, as he alleges in his reply, they were void because the consideration therefor was illegal, they having admittedly been given in consideration of concessions made by him for and on behalf of the corporation of which he was president and a director. A third defense is that by the terms of the writing, Defendant's Exhibit B, as it must be constructed in the light of the situation of the parties and the subject matter, **Mr. Goldthwaite has been exonerated from liability on his notes by the payment which was made of $53,905.92 and interest on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, assigned by the latter company to Sanborn, and by him to the Board of Trade, and by the latter to the Menefee Investment Com-**

pany. We think that the plain meaning of the writing is, that all payments on that indebtedness were to be credited against the notes, and it is not controverted that the payment which was made in July, 1925, was a payment **pro tanto** of that debt. This defense was set up in the answer, and it was proved by the introduction of the written agreement of the parties, with the evidence of the circumstances necessary for the interpretation thereof. As to this defense, it does not matter whether the notes were given for the personal benefit of the plaintiff or that of the corporation, or whether they were collateral security or primary obligations—it was expressly agreed between the parties that they were to be credited with all payments made on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, and it is conceded that payments have been made on that debt to an amount sufficient to wipe out the Goldthwaite notes.

The writing, Defendant's Exhibit B, copied at page 8 of the plaintiff's brief, constitutes in large part the proof of our first defense, which is that the notes were collateral security only; and it is the main substance of our third defense, which is, that no matter whether the notes were collateral security or not, they were to be credited with all payments made on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company; it being admitted that payments in excess of the amount of the notes have been made.

The contention of plaintiff is that the promissory notes and the writing, Defendant's Exhibit B, are absolutely complete agreements, so perfect and clear, so definite in respect to consideration and every other element and circumstance, that the defendant was not even entitled to show in respect thereto what the code of Oregon in Section 717 expressly provides that every party to a litigation may show respecting every agreement.

The defendant on the other hand contends that the notes themselves tell nothing as to what the actual consideration was, and that the writing, Plaintiff's Exhibit B, is very far from being a complete and formal document, embodying the full expressions of the agreement of the parties, referring as it does on its face to a conversation and an oral agreement existing outside thereof, and to other matters in respect to which it can not be interpreted without proof of the circumstances surrounding its execution and explaining the relations of the parties to the subject matter. The very first thing referred to in defendant's Exhibit B is a conversation and a personal agreement in connection with the claim of the Macomber-Savidge Lumber Company against the Modoc Lumber Company. Inasmuch as a conversation is mentioned, it appears to refer to an oral agreement outside the writing, Defendant's Exhibit B, on which it is founded, in part at least. When inquiry was made, it immediately developed that such was the fact, and the brief of the plaintiff admits as much. Plaintiff

himself testified, as we have quoted his testimony above in our discussion of the first assignment of error, that it was part of the understanding when the notes were signed that he would consent to the claim of the Macomber-Savidge Lumber Company being filed with the Board of Trade. Defendant's testimony shows without dispute that the whole consideration for the giving of the notes was the agreement of Macomber on behalf of his Company to file its claim in a reduced amount with the Board of Trade, and to participate along with the other creditors in the plan for refinancing. Plaintiff's attorneys calmly adopted all this matter as part of the material facts of the case and set out on pages 6 to 8 of their brief. What we are trying to get at is this—the writing, Defendants Exhibit B, does not purport to be a complete embodyment of the agreement of the parties. It refers to a conversation and to some agreement already existing. It provides that Mr. Goldthwaite is to approve a certain claim of the Macomber-Savidge Lumber Company against the Modoc Lumber Company. To be of any effect, such approval would have to be an official act on behalf of his corporation. The writing does not say what that claim was. Oral proof was necessary to show that fact. The writing does not say that the claim was a disputed one. That is a material circumstance requiring parol proof to show it. What consideration was being given for the concession made by the Modoc Lumber Company in approving the disputed items of

the claim? The writing mentions none and parol proof was necessary to show what such consideration was. What has the San Francisco Board of Trade to do with the claim, and why are any payments to be made to that institution? The writing does not say. Oral evidence is necessary to show what its connection with the transaction is to be, and what the parties had agreed to in that respect. What "personal notes" are referred to in the writing? It does not say. Parol evidence was necessary to show. What was Macomber's relation to the Macomber-Savidge Lumber Company? The writing does not say. Parol evidence was necessary on that point and likewise as to Goldthwaite's relations to the Modoc Lumber Company. On page 7 of plaintiff's brief his counsel say that "defendant undertook negotiations with F. B. Macomber to obtain his consent to the trustees filing a claim * * * in the reduced amount of $53,000. Mr. Macomber, on February 28, 1922, agreed * * * to consent to the division and reduction of the claim and * * * to the filing by the trustee of proof of said claim in the sum of $53,000, if J. O. Goldthwaite, defendant in error, would approve the entire amount owing allowed by his company to Macomber-Savidge Lumber Company, and would personally give his individual ten notes to F. B. Macomber as an individual in the sum of $5000 each for obtaining the individual consent of Mr. Macomber to the loss to his individual interest, which would result because of the loss of the immediate right to proceed against the debtor,

because of the allowing the Menefee interests priority in security between the mortgages, and also because it would effectuate the giving up by the Macomber-Savidge Lumber Company of a right to have the balance of its claim, to wit, about $18,000.00, secured, postponing it to a third and inferior position and thus involving Macomber in an individual loss. This was agreed to by Mr. J. O. Goldthwaite, and the agreement so reached was reduced to writing, a copy of which agreement is as follows," and plaintiff's attorneys then proceded to set out the writing, Defendant's Exhibit B, which does not contain a single one of these terms which plaintiff's counsel say were part thereof, except the provision that defendant was to approve the amount of the claim of the Macomber-Savidge Lumber Company. Of course, we are not admitting that plaintiff's counsel are correct in stating that the consideration for the notes was the individual consent of Macomber and the individual loss he suffered. Nobody has so testified—not even plaintiff himself, and the Court has found otherwise. But the point is that it is evident on the face of the writing that it does not state all of the terms of the agreement of the parties, and in particular that it does not state the consideration for the giving of the notes; and plaintiff's counsel admit as much. This being so, parol evidence to supplement the writing was admissible.

In 22 C. J. at page 1283, the rule is stated as follows:

> Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or understanding of the parties, the parol evidence rule does not apply to prevent the introduction of extrinsic evidence with reference to the matters not provided for in the writing.

This rule is supported by the citation of hundreds of authorities, including decisions of this court. See also Contract Company v. Bridge Company, 29 Ore. 553.

The question presented by the fourth assignment of error is whether, under the law applicable to negotiable instruments and the general rules of evidence and practice in effect in the State of Oregon, the lower court erred in permitting the defendant to testify to what the consideration for the notes was. The first ground on which it is contended that the evidence was not admissible is that the question of consideration was not put in issue by the pleadings.

The amended complaint, in paragraph II of each cause of action, alleges that on the first day of March, 1922, defendant made his certain promissory note in writing in words and figures as follows, and then sets forth a copy of the note, containing therein the words "value received."

The answer of the defendant to this paragraph of the amended complaint, as to each of the ten separate causes of action, is as follows:

> Defendant admits that on or about the first day of March, 1922, he made a promissory note in form as alleged in paragraph II thereof; but denies that same was made or delivered except as hereinafter affirmatively alleged; and denies each and every allegation of said paragraph except as hereinafter affirmatively alleged.

Nor is the foregoing by any means the end of the matter. In paragraph III of each separate cause of action of the amended complaint it is alleged that the plaintiff is now the lawful owner and holder of the said promissory note. This allegation is denied in the answer thereto; which puts in issue the ownership of the notes; and under that issue the defendant is entitled, as the authorities abundantly show, to introduce his proof that the consideration for the notes did not proceed from the plaintiff.

In his affirmative answer the defendant has set the transaction out fully as to what the actual consideration was. After alleging the matters of inducement and setting forth fully the relations which existed between the Modoc Lumber Company and the Macomber - Savidge Lumber Company at the time the notes were given, the answer alleges:

> In order to keep the amount of the second mortgage or such form of funded indebtedness as might be agreed upon, down to the limit fixed by the said lender, it was necessary that the amount of the claim of the Macomber-Savidge Lumber Company to be included therein should not exceed $5[illegible],000.00 or thereabouts.

To obtain said concession, the Modoc Lumber Company and this defendant on the one part agreed with the Macomber-Savidge Lumber Company and the plaintiff herein on the other part, that the Macomber-Savidge Lumber Company, through its trustee, should present and assign its claim to the Board of Trade of San Francisco for inclusion in the second mortgage or other form of funded indebtedness in the amount of only $53,905.92, and that in consideration thereof the Modoc Lumber Company should approve the claim of the Macomber-Savidge Lumber Company as stated by it, in the amount of $68,164.83, and in addition thereto, that the defendant should guarantee the payment of part of the said claim, to wit, to the amount of $50,000, by giving the promissory notes described in the complaint and hereinafter mentioned. * * *

The said ten promissory notes described in the amended complaint were each and all made, given and delivered by the defendant, and taken, accepted and received by the plaintiff, for the use and benefit of and as agent for the Macomber - Savidge Lumber Company, **solely on the consideration aforesaid** and on the agreement and understanding between the parties to said notes, had and entered into at the same time the notes were given, that the defendant should thereby become bound as surety and guarantor for the Modoc Lumber Company up to the amount of $50,000.00 for the payment of said indebtedness then existing and owing from the last named company to the Macomber - Savidge Lumber Company as here-

inbefore set forth, and not otherwise.

The requirements of the law as to the framing of an issue of want of consideration are simple. In 8 C. J., p. 916, subject, "Bills and Notes," Section 1204, under the sub-title, "Sufficiency of Plea of Want of Consideration," it is said:

> A general averment that defendant made the contract without any consideration therefor, or the use of equivalent language, is usually deemed sufficient.

Sustaining this statement, see:

> Hunter v. McLaughlin, 43 Ind., 38, 45.
> Grimes v. Ericson, 94 Minn., 463.
> Goding v. The MacArthur Co., 181 Ill. App. 373.

The court will see that we have not only denied the allegations of the amended complaint respecting the making and consideration of the notes to have been anything else than what we affirmatively allege the facts to have been; but that we have gone to the pains of setting up fully the exact facts, showing what the consideration actually was, and that it did not proceed from the plaintiff, but from his corporation. We think the court will agree with us that the pleadings were ample to permit us to present the facts.

We turn now to the assertion of our opponents that the answer to the amended complaint contains no allegation that the consideration was illegal, and to the contention, based thereon, that we could

not urge, and the court could not consider, the question of the illegality of the consideration to sustain the notes, against the plaintiff's claim that the notes were given for his own sole and personal benefit and not for the benefit of his corporation. It is true, that there is no allegation in the answer that the consideration for the notes was illegal. Such an allegation, if inserted, would have been a mere conclusion of law. We did set forth in the answer, quite explicitly, the facts as to what the actual consideration was, namely, certain concessions respecting the Macomber-Savidge Lumber Company's claim as a creditor against the Modoc Lumber Company, negotiated and granted on behalf of the Macomber-Savidge Lumber Company by and through the plaintiff as its president. That such a consideration as the basis for a private benefit to the officer himself who negotiates and makes the arrangement, is an illegal consideration, follows as inevitably, as a conclusion of law from the facts pleaded, as darkness follows the going down of the sun. Plaintiff and his attorneys seem to think that it was perfectly legitimate for the chief and managing officer of a corporation to bargain away its rights and take for himself in return therefor security he might have got for the corporation itself, and that he can stand up in a court room and boldly say, "I did it, but you have not alleged that it was illegal," and escape on that footing with his ill-gotten booty.

Even if we had not thus explicitly pleaded the

facts which show the consideration to be illegal, if the plaintiff is, as he asserts, the beneficial owner of the notes, the facts are so far admitted by the plaintiff as to what the consideration was, that we would be entitled to the advantage of the defense of illegality of consideration.

Oscanyan v. Arms Co., 103 U. S., 261.
Chandler v. Lack, (Okla.), 170 Pac. 516, 14 A. L. R. 461.
Ah Doon v. Smith, 25 Ore., 89.

The position taken by plaintiff in his brief as to what was the actual consideration for the notes sued on, makes the case simple. It amounts virtually to an admission that the consideration was what defendant has said it was in the answer to the amended complaint, namely, an agreement that the plaintiff's company would join the rest of the creditors, turn its claim over to the Board of Trade and reduce the claim as thus filed to $53,905.92.

We think we have abundantly established that so far as the pleadings were concerned defendant was entitled to introduce evidence as to what was the consideration for the notes and the written agreement which accompanied them.

The next point alleged against our right to introduce such proof is that we were barred by the parol evidence rule from introducing evidence respecting the consideration for the notes and the written agreement. We have already shown that when the writing appears on its face or is admitted

to be incomplete and not to set forth all of the terms of the agreement, the parol evidence rule does not apply. We have also advanced the contention that proof of the consideration was under the circumstances here presented one of the proper facts to be shown under Sec. 717 Oregon Laws. One of our defenses set up in the answer is that the notes were collateral security. An inference that such is the case is raised up by the fact that it appears on the face of the contemporaneous writing that any payments made on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company were to be credited on the notes. In 22 C. J., p. 1147, the principle is stated that "parol evidence is admissible to aid an inference which may be deduced from a written instrument." We have found also that the plaintiff admits in his brief that the consideration for the notes and the written agreement was something not stated in the writings, and relies on the parol evidence in the case to establish the facts in respect thereto. Aside from these matters, which it seems to us completely dispose of the objection interposed against the introduction of evidence to show what the consideration was, it is well established that the true consideration of a note may be shown by parol; and such proof constitutes no breach of the parol evidence rule.

People's Bank & Trust Co. v. Floyd, 200 Ala. 192, 75 So. 940.

First State Bank of Eckman v. Kelly, 30 N.D.

84, 152 N.W. 125, Ann. Cas., 1917 D, 1044.
Herrman v. Combs, 119 Md., 41, 85 A., 1044.
Stalnaker v. Tolbert, 121 S. C., 437, 144 S. E., 412.
Dixon v. Miller, 43 Nev., 280.
State Savings Bank of Logan v. Osborn, 188 Iowa, 166.

Defendant is not precluded by the recitation in the notes that they were given for value received from showing by parol that there was in fact no consideration or no lawful or valid consideration entitling the plaintiff to recover thereon in his own interest. The presumption of a consideration raised by Sec. 24 of the Negotiable Instruments Act is merely **prima facie** and may be rebutted.

Dougherty v. Salt, 227 N. Y. 200.
Shriver v. Danby, 12 Del. Ch. 84, 106 A. 122.
State Savings Bank of Logan v. Osborn, 188 Iowa, 166.
Kramer v. Kramer, 181 N.Y. 477, 74 N.E. 474.
In the Matter of Pinkerton, 49 Misc. 363, 99 N. Y. S. 492.
Holbert v. Weber, 36 N. D. 106, 161 N. W. 560.
First Nat'l Bank of Bangor v. Paff, 240 Pa. St. 513, 87 A. 841.
Nicholson v. Neary, 77 Wash. 294, 134 P. 492.
Lombard v. Bryne, 194 Mass. 236, 80 N. E. 489.
Cawthorpe v. Clark, 173 Mich. 267, 138 N. W. 1075.
Best v. Rocky Mt. Nat. Bank, 37 Colo. 149, 85 P. 1124, 7 L. R. A. (N. S.) 1035.

Citizen's Nat. Bank v. Bean, 26 N. M. 203, 190 P. 1018.
Ginn v. Dolan, 81 Ohio St. 121, 90 N. E. 141, 135 A. S. R. 761, 18 Ann. Cas. 204.
Hudson v. Moon, 42 Utah, 377, 130 P. 774.
Shriver v. Danby, 12 Del. Ch. 84, 106 A. 122.
8 C. J. 916, and cases cited.

Plaintiff's attorneys interpret the words "prima facie" used in respect to the presumption of consideration in the negotiable instruments act as meaning conclusive and indisputable. The courts do not regard it in any such light, as will appear from an examination of the cases we have just cited. For instance, in Dougherty v. Salt, 227 N. Y. 200, the Court said respecting the expression "value received" used in the note:

> "The formula of the printed blank becomes in the light of conceded facts a mere erroneous conclusion which can not overcome the inconsistent conclusion of the law."

In the case of Nicholson v. Neary, 77 Wash. 294, the Court said, having this very point under consideration:

> "A presumption of fact is not evidence, but a rule of law fixing the order of proof. When proof is offered to rebut the presumption, the burden shifts, and it is incumbent upon the opposing party to sustain his case by competent evidence."

The plaintiff makes the point that no failure of consideration is pleaded. It is pleaded, in the answer, that the notes were given only as collateral security, and that the principal debt has been paid. In the case of La Grande Nat'l Bank v. Blum, 26 Ore., 49, in an opinion written by the same able judge who tried this case below, it was held that the maker of a note as against the payee, may show by extrinsic evidence that the note was made and delivered as security for the performance of a contract by him, and that he has performed his contract; and such evidence does not change or add to the terms of the writing, but shows simply a failure of consideration.

Encountering once again in plaintiff's brief the contention that our answer is insufficient to admit proof of the facts objected to, we are led to say that we wish the plaintiff would tell the Court at the oral argument just what are the material facts forming part of our defense which we have failed to plead, and also what material facts not pleaded the lower court has included in its findings. We believe we have pleaded all the facts we have offered evidence to prove. We certainly have pleaded all the facts to the proof of which objection was made, and all the facts found by the lower court. We can not perceive the slightest footing for the contention that the answer is insufficient to admit the proof.

At the foot of page 39 of plaintiff's brief, his

counsel naively say that "there was no ambiguity in the ten notes introduced by the plaintiff herein, and it was error to admit evidence of surrounding circumstances." Was there any ambiguity in the contract, Defendant's Exhibit B, which admittedly was a part of the same transaction? But entirely aside from the matter of ambiguity, there is no such rule as plaintiff's counsel here have put into words. No case is cited in which any court has held that proof of the surrounding circumstances is not admissible for the construction of a writing. Abraham v. O. & C. R. R. Co., which plaintiff's counsel cite, quotes with approval, on page 501, the language of Mr. Justice Clifford, in Moran v. Prather, 90 U. S. 501, as follows: "Ambiguous words or phrases may be reasonably construed to effect the intention of the parties, but the province of construction, except when technical terms are employed, can never extend beyond the language employed, **the subject-matter, and the surrounding circumstances.**"

This plainly means that proof of the subject matter and surrounding circumstances is receivable in all cases. In Meyer v. Everett P. & P. Co., this Court held that letters written prior to the contract were properly received in evidence to explain its meaning.

We think we have shown that the oral evidence called for by the question and answer covered by the fourth assignment of errors was admissible, on each and all of the following grounds:

1. The fact as to the consideration was part of the subject matter and one of the existing circumstances provable under Section 717 Oregon Laws.

2. The written agreement, Defendant's Exhibit B, is ambiguous on its face, and proof of the consideration, among other things, is necessary to a correct interpretation thereof.

3. Said Exhibit B mentions a conversation and a prior agreement as the basis thereof, and indicates on its face that it is not a complete embodiment of the contract between the parties, which circumstance renders parol proof admissible to supply the missing parts.

4. The admissions made by the plaintiff in his brief show that there were important terms, including the consideration for the agreement, which do not appear in the writing and which rest in parol.

5. The plaintiff himself has adopted parol evidence as the basis for supplying these missing terms of the agreement.

6. Defendant's Exhibit B contains provisions which raise an inference that the notes were collateral to the debt of the Modoc Lumber Company. Parol evidence is permissible to aid that inference.

7. Where the consideration for a negotiable instrument is put in issue by the pleadings, parol evidence is admissible to show the true consideration.

We turn now to the discussion of the contention that defendant was barred by Section 808 Oregon Laws, quoted on page 40 of plaintiff's brief, from showing by parol evidence that the notes sued on were given as collateral security or a guaranty. We have called Mr. Goldthwaite a limited guarantor. This contract was made in California. We have been a little puzzled to define Mr. Goldthwaite's position thereunder. It does not appear to matter whether he be called a guarantor or a surety.

California Civil Code, Edition 1923, Title xiii, Sec. 2787, defines a guaranty as follows:

> A guaranty is a promise to answer for the debt, default, or miscarriage of another person.

In Montgomery vs. Sayre, 91 Cal., 206, it is held:

> The maker of a note given to secure the payment of the note of a corporation, endorsed by a third person, and secured by mortgage upon the property of the corporation, is, in law, a surety, and if such endorser is released from obligation to pay a deficiency judgment rendered against him and the corporation jointly, in a suit for foreclosure of the mortgage and which became a lien upon the lands of the endorser, the maker of the collateral note is exonerated from liability.

Does the record show any error of the lower court in receiving parol evidence to establish the fact found by the court that the notes were exe-

cuted as collateral security and a limited guaranty of the indebtedness of the Modoc Lumber Company to the Macomber-Savidge Lumber Company? We have shown that there are only three exceptions in the record, the first, set forth in assignment number I, being a question as to whether immediately before the notes were signed there was any argument between the plaintiff and the defendant as to whether the Macomber-Savidge Lumber Company would put its claim into the hands of the Board of Trade; on which objection the court reserved its ruling, and the question was never answered.

The second exception, if it be deemed that there is one, is set forth in the second assignment. The question objected to was whether at the time when Goldthwaite agreed to approve the account of the Macomber-Savidge Lumber Company, Macomber, the plaintiff, made any question as to whether he was representing his company or himself personally. Inasmuch as the plaintiff has himself testified at page 114 that he made the settlement on behalf of his company, error can hardly be alleged as to the reception of Mr. Goldthwaite's testimony on the same point.

The other exception is found in the fourth assignment; the question objected to being a question put to the defendant as to whether there was any other consideration for the notes than that stated in the answer. In deciding whether the court erred in receiving this testimony, it must be

borne in mind that the fact that the notes were a collateral guaranty was not the sole defense in the case. There was, as we have pointed out in detail, the defense of illegality of consideration, which the lower court has ruled, as a matter of law, was a good defense, if the notes were in fact given for the personal benefit of the plaintiff, in consideration of any action which he took on behalf of the Macomber - Savidge Lumber Company, of which he was president. There was also the defense that the notes were discharged by the payments made to the full amount of $53,905.92 on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, by virtue of the terms of the written agreement, Defendant's Exhibit B, as it must be interpreted in the light of the relations of the parties and the surrounding circumstances. The evidence objected to under the fourth assignment of error was admissible on these issues, notwithstanding it might have a tendency to show that the notes were given as collateral security. But we are ready to maintain that the evidence objected to was admissible, as against any objection made thereto, even if there had not been these other defenses set up in the answer.

In 27 C. J. at page 381, discussing the statute of frauds, the law is stated as follows:

> Since, however, this rule does not require any other rules in respect to the competency of parol evidence to be applied to contracts within the statute than are applicable to writ-

> ten contracts in general, parol evidence is admissible to show the situation and relation of the parties and the surrounding circumstances at the time the contract was made.

The foregoing statement of the law is abundantly supported by authorities.

This being so, proof of what the consideration for the notes and contract was and who paid it would be admissible, not for the purpose of showing that the notes were not binding obligations, but for the purpose of showing for whose benefit they were given, and who owned them, which were issues in the case, tendered not only by the defendant in his answer, but by the plaintiff in his complaint and in his reply. Surely the plaintiff can not tender such issues in the pleadings and then say that no evidence bearing thereon is receivable.

We maintain that on the basis of the facts pleaded in the answer, assuming now for the purpose of the argument that those facts are established, the position of Mr. Goldthwaite as maker of these notes was that of a guarantor or surety for his company on its debt to the Macomber-Savidge Lumber Company, up to the amount of $50,000. Before going further with the discussion of Section 808 Oregon Laws and the argument now made on the authority of said section as to alleged error in the introduction of evidence respecting the consideration for the notes, we wish to establish our legal

position as to defendant being a guarantor or surety.

THE FACTS AND CIRCUMSTANCES WERE SUCH AS TO CONSTITUTE GOLDTHWAITE NOTHING MORE THAN A LIMITED GUARANTOR OF THE DEBT OF HIS COMPANY.

The only debt existing at the time the notes were signed, was the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company. The Modoc Lumber Company was principal debtor, and liable in the first instance to pay the debt.

The Supreme Court of Oregon, in the case of Hoffman vs. Habighorst, 49 Ore., 387, has quoted and adopted the language of Mr. Chief Justice Cooley in the case of Smith vs. Sheldon, 35 Mich. 42, as follows:

> Now, a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds are taken. The relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but, if he knows that one party is surety merely, it

is only just to require of him that in any subsequent action he may take regarding the debt he shall not lose sight of the surety's equities.

In the same case, at pages 381 and 382, the court said:

> * * * It may be shown by parol that a promissory note was in fact made to secure the debt and liability of another, and thus all the makers be entitled to the rights of a surety as to the payee of such note having knowledge of the facts. If such a note is enforced against the makers, they would clearly be entitled to be indemnified by the principal debtor; and this is given as one of the tests of suretyship. The form of the obligation would not prevent the introduction of such evidence.

In the same case, in 38 Ore. at page 268, the court said:

> But, within the meaning of the rule under consideration, every one who incurs a liability in person or estate, for the benefit of another, without sharing in the consideration, stands in the position of a surety, whatever may be the form of his obligation. It is true that generally the primary obligor or real debtor joins in the contract with the sureties. This is not, however, believed to be necessary or essential. 'The relation of suretyship,' say the editors of White & Tudor's Leading Cases in Equity, 'grows out of the assumption of a liability at the request of another, and for his benefit. It may, consequently, arise, although the name of the principal does not appear in the instrument which constitutes the evidence of the debt.

In Colebrooke on Collateral Security, the author gives the following definition:

> Sec. 2. Collateral security is a separate

> obligation, as the negotiable bill of exchange or promissory note of a third person * * * delivered by a debtor to his creditor to secure the payment of his own obligation represented by an independent instrument. Such collateral security stands by the side of the principal promise as an additional cumulative means for securing the payment of the debt. * * * 'Collateral', in the commercial sense of the word, is a security given in addition to the principal obligation, and subsidiary thereto.

In Section 10, Colebrooke says:

> Such delivery of negotiable instruments as collateral security may by agreement between the parties be made to a third person.

In Joyce on Defenses to Commercial Paper (1 Ed.) Sec. 213, the author says:

> No exact line of demarkation between a guarantor and a surety can be satisfactorily made.

In Colebrooke on Collateral Security, Sec. 202, the writer says:

> The contract or undertaking of a surety is a contract to be answerable for the payment of some debt or the performance of some act or duty in case of the failure of another person who is himself primarily responsible for the payment of such debt or the performance of the act or duty. Such contracts may be arranged in three divisions:
>
> 1. Those in which there is an agreement to constitute for a particular purpose the relation of principal and surety, to which agreement the creditor thereby secured is a party.
>
> 2. Those in which there is a similar agreement between the principal and surety only,

to which the creditor is a stranger; but in which the creditor, having notice of such relations between the parties, will not be at liberty to do anything to the prejudice of the rights of the surety or to refuse (when his own just claims are satisfied) to give effect to them.

3. Those in which, without any such contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.

The fact that one may benefit indirectly by a transaction does not make him a principal. It was so held in the case of Hughes v. Ladd, 42 Ore., 123, which is also instructive on other points. The principal debtor in that case had signed no note; but it appeared that the money was borrowed and used for its corporate purposes; and the individual signers were therefore held to be sureties only.

The facts of the case, considered in the light of the foregoing legal authorities, make it clear that the position of the defendant was that of a surety or guarantor for his company. We have called him a guarantor because of the statutory definition in the Civil Code of California quoted above. It is undisputed that the Modoc Lumber Company, at the time the notes were given, was indebted in a large amount to the Macomber-Savidge Lumber Company; that Goldthwaite was the owner of all the capital stock of the Modoc Lumber Company,

and its president and managing officer; that Macomber was one of the principal stockholders, and was the president and managing officer of the Macomber-Savidge Lumber Company; and the lower court has found that these parties were representing their respective corporations in the negotiations which were under way at the time the notes were given, and prior thereto.

Now,with regard to Sec. 808 Oregon Laws, the first remark we have to make is that it has nothing to do with the case, so far as the validity and obligation of the contract are concerned. This being a contract made and to be performed in the State of California, we take it to be well settled law that we must look to the laws of that State for our guidance as to everything touching its validity.

Selover Bates & Co. v. Walsh, 226 U. S. 112, 33 Sup. Ct. 69.

In re Barnett, 12 F (2d) 76.

Scudder v. Union National Bank, 91 U. S. 406, 412.

Jenkins & Reynolds Co. v. Alpena Portland Cement Co., 147 Fed. 641.

Callaway v. Prettyman, 218 Pa. 293, 67 A. 418.

Assuming that the contract, in respect to the substantive law by which its validity and obligation must be determined, is governed by the law of California, we will examine for a moment the provisions of that law. The applicable part of Sec.

1624 of the Civil Code of California, of which plaintiff quotes only a portion on page 40 of his brief, reads as follows:

> "Sec. 1624. The following contracts are invalid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or his agent. * * * 2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Sec. 2794.

Sec. 2793 of the same Code reads as follows:

> "Except as prescribed by the next section, a guaranty must be in writing and signed by the guarantor; but the writing need not express a consideration."

As a matter of course a contract of guaranty, like any other contract, must have a consideration to make it binding. Inasmuch as the law of California not only omits from Sec. 1624 any requirement that the consideration must be stated in the memorandum, but in Sec. 2793 it expressly provides that the writing need not express the consideration, it remains that in every case where the consideration is not expressed in the writing, it must be proved by parol.

The next remark we have to make respecting the invocation by the plaintiff of Section 808 Oregon Laws as the basis of his claim that there was error in the admission of the evidence covered by the exception embodied in the fourth assignment of error is, that no such objection was interposed in the lower court, and the point was not raised

there. We refer again to page 153 of the transcript. It will be found that the only grounds stated for the objection were, that no failure of consideration was pleaded, that the fact attempted to be proved had not been pleaded in the answer, and that the evidence asked for varied the contract. Not a word is to be found in the objections with respect to the Oregon statute of frauds, or any other statute of frauds. As a rule of substantive law, the Oregon statute has no application, as we have shown; and it is well settled and elementary that as a rule of evidence the statute is waived, unless objection on the ground thereof is duly interposed at the time the evidence is offered.

Nunez v. Morgan, 77 Cal. 427.
Gilman v. McDaniels, 177 Iowa 76.
Miller v. Harper, 63 Mo. A. 293.
Holt v. Howard, 77 Vt. 49.
Eaves v. Vial, 98 Va. 134.

Finally on this specific point of Sec. 808 Oregon Laws, we call attention to the fact that the Supreme Court of that state in Hoffman v. Habighorst, 38 Ore. 261, has negatived all the contentions plaintiff is advancing in respect to the admission of parol evidence to show that the maker of a promissory note is in fact a surety. That case, like this one, involved a promissory note to which the principal debtor was not a party. The court said, at page 267:

> The admission of parol evidence to show the true relationship of the makers of a promis-

sory note, and that the payee had notice thereof, does not alter or vary the terms of the original contract, or affect its integrity. It is merely proof of an independent or collateral fact, which operates to relieve the surety from liability when the creditor, with knowledge of the fact, has changed the original or made a new contract with the principal debtor, without the knowledge of the surety, or released any security he may hold for the payment of the debt. "The fact that one debtor is a surety for the other is no part of the contract with the creditor," says Mr. Chief Justice Gray, "but is a collateral fact showing the relation between the debtors; and, if it does not appear on the face of the instrument, this fact, and notice of it to the creditor, may be proved by extrinsic evidence"; Guild v. Butler, 127 Mass. 386. * * *

Within these principles there seems no valid reason why it may not be shown by parol that a promissory note was in fact made to secure the debt and liability of another, and thus all the makers be entitled to the rights of a surety as to the payee of such note having knowledge of the facts. If such a note is enforced against the makers, they would clearly be entitled to be indemnified by the principal debtor; and this is given as one of the tests of suretyship. The form of the obligation would not prevent the introduction of such evidence, because, as said by Mr. Justice Campbell, in Canadian Bank of Commerce v. Coumbe, 47 Mich. 358 (11 N. W. 196), "it is always competent to show that any obligation, whatever its form, was in fact made for the debt or liability of another; and, where this is the case, the contract is one of suretyship, and the surety, if he is held to pay it, may sue for reimbursement. * * * And when a

creditor knows that his debtor is a surety he is bound to take no steps which will change the liability of the principal, without the surety's consent. * * * This doctrine is too elementary to require any discussion." Mr. Brandt says: "The sole maker of a promissory note is sometimes entitled to stand in the position of a surety"; 1 Brandt, Sur. (2 ed.), Sec. 38.

Furthermore, in the case of First National Bank vs. Hawkins, 73 Ore. 188, it was held that a promissory note is a sufficient memorandum of a guaranty to satisfy the statute of frauds, and that the recitation therein of the words "value received" is a sufficient expression of the consideration.

The rule thus announced in Oregon is not peculiar to that state. It is the general rule that it may be shown by parol that a promissory note absolute in form was in fact given as security.

Sec. 16, Uniform Negotiable Instruments Law

(Cal. Civ. Code, 3097, adopted, Laws 1917, Chap. 751).

Wigmore on Evidence (2 ed.), Sec. 2437 and note.

O'Brien v. Paterson Brewing and Malting Co., 69 N. J. Eq. 117.

Kelly v. Ferguson, 46 Howard Practice Reports (N. Y.) 411.

Lafayette Nat. Bank of Buffalo v. Eberly, 199 N. Y. S. 787.

Silva v. Gordo (1924), 65 Cal. App. 486, 224 P. 757.

Drovers' Cattle, Loan & Inv. Co. vs. McGraw (1921), 150 Minn., 50.
First Nat. Bank of Crary vs. Miller (1920), 46 N. D., 551.
Lopato v. Hayman, 43 R. I., 271.
Herron v. Brinton, 188 Iowa, 60.
Bell v. McDonald (1923), 308 Ill. 329.
Lamberson v. Love, 165 Mich. 460.
Dixon v. Miller, 43 Nev. 280.
Clark v. Ducheneau, 26 Utah, 97.
Howard v. Stratton, 64 Cal. 487.
Norton v. Tucson Cattle Loan Co. (Arizona, 1925), 236 P. 1110.
Bowker v. Johnson, 17 Mich. 42.
Schlamp v. Manewall, 196 Mo. App. 123, 190 S. W. 658.
Vinson v. Wooten, 163 Ark. 170.
Kirchdorfer v. Watkins, (1923 Ky. App.) 248 S. W. 251.
Lyons v. Stills, 97 Tenn. 514.
Allen's Col. Agency v. Lee (1925) 73 Cal. App. 68, 238 Pac. 169.
Ledford v. Huggins, 89 Okla. 224.

We are unwilling to lengthen this brief by setting out extracts from the decisions. Many of the above cases are close parallels to the one at bar. We call especial attention to Kelly v. Ferguson, Lamberson v. Love, Norton v. Tucson Cattle Loan Co., Clark v. Ducheneau, Vinson v. Wootan, Kirchdorfer v. Watkins, and Silva v. Gordo. In Kirchdorfer v. Watkins the court held that it was com-

petent to show by parol that a note was in fact executed as collateral security for another existing debt; and that a statement in a note that it was to be credited with one-third of the proceeds of the sale of corporate stock is a sufficient reference to another transaction to render competent parol proof that the note was given as part of a transaction involving the purchase of the stock, and that the maker was liable thereon only for the balance due from him on the other transaction.

Silva v. Gordo, a recent California case, was an action on a promissory note. The holding of the court is stated in the syllabus as follows:

> Parol evidence being admissible to show the consideration or want of consideration for a note sued on, the court erred in striking out special defense that the note was given and received only as security for faithful performance of an agreement, which defendants were ready, willing and able to carry out, irrespective of Civ. Code, Sec. 3097, authorizing proof that delivery was conditional or for a special purpose only.

The California decisions are reviewed therein. It makes special reference to section 16 of the Uniform Negotiable Instruments Act, which we will discuss later, and is in point on that part of the discussion. So much of the opinion is in point that we shall not copy extracts from it, but ask the court to examine the same.

Section 16 of the Uniform Negotiable Instruments Act (Cal. Civ. Code Sec. 3097, adopted Laws

1917, Chap. 751) contains the following language:

> As between immediate parties * * * the delivery may be shown to have been conditional, or for a special purpose only.

This section is said to be declaratory of the prior law, Story v. Story (1914) 214 Fed. 973; S. Allen Grocery Co. v. Buchanan Co. Bank (1916), 192 Mo. App. 476, 182 S. W. 777.

In numerous cases interpreting this section the courts have held that proof of such collateral facts as were proved in the case at bar may be made by parol evidence. We cite for instance:

Mason v. Cater, (Ia) 182 N. W. 179.

Devine v. Western Slope Fruit Grower's Ass'n., 27 Colo. App. 368.

Security Savings Bank v. Hambright, 192 Ia. 1147.

City National Bank of Huron v. Dwyer (S. D.) 200 N. W. 109.

A large part of the cases cited in the foregoing parts of this brief, holding parol evidence to be admissible under such circumstances, were decided by courts of states where the Uniform Negotiable Instruments Act was in effect at the time.

There is another principle well recognized by the courts, which is applicable here, and that is in an action on a promissory note or any other contract, it may be shown that the plaintiff is not the beneficial owner thereof and that the beneficial interest is vested in a third person; and a set-off

or other defense against such beneficial owner may be set up against the note.

Bowen v. Snell, 9 Ala. 481.
Hooper v. Armstrong, 69 Ala. 343.
Henry v. Scott, 3 Ind. 412.
Jump v. Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265.
Engs v. Matson, 11 Ill. App. 644.
Challiss v. Wylie, 35 Kan. 506.
Masterson v. Goodlett, 46 Tex. 402.
Strong v. Gordon (Mo. 1920), 221 S. W. 770.
Kelley-Clark Co. v. Leslie (Cal. Civ. App. 1923), 215 P. 699.
Andrews v. Varrell, 46 N. H. 20.
Bennett v. Tillmon, 18 Mont. 28.
Best v. Rocky Mt. National Bank, 7 L. R. A. (N. S.) 1035.

Summarizing our answer to the arguments of plaintiff under point One of his brief, covering assignments numbered I to VI inclusive, to the effect that the court erred in receiving parol evidence to establish the fact of suretyship, because of Section 808 Oregon Laws, we have shown:

1. The evidence objected to was admissible on other issues of the case.

2. The evidence was admissible under Section 717 Oregon Laws, entitling us to show the circumstances and relations of the parties.

3. Only the first, second and fourth assignments

are based on any exceptions to admission of evidence taken in the court below, and in none of them was the statute of frauds the basis of the objection.

4. The action being purely personal, based on a contract made and to be performed in California, the law of that state determines its validity.

5. The law of California does not require the consideration to be stated in the writing, but permits proof to be made independently thereof.

6. Plaintiff has waived any benefit of the Oregon statute of frauds, if it be applicable as a rule of procedure, by failing to object to the evidence on the ground thereof.

7. Even if there had been such an objection and an exception based thereon, it would be unavailing, because by the law of Oregon, parol proof is permitted to establish the fact that a promissory note was given only as security, and that the maker is a surety.

8. It is also settled law in that state that a promissory note evidencing the obligation of the surety is a sufficient memorandum under the statute of frauds, and that the words "value received" are a sufficient statement of the consideration.

9. This is the law generally; that is, it may be shown everywhere that a promissory note was in fact given as security.

10. The evidence was also receivable to show who was the beneficial owner of the notes.

POINT II OF PLAINTIFF'S BRIEF.

We read with astonishment the discussion under point II, relating to the seventh assignment, which alleges error of the Court in stating the law of the case in the opinion. Same is not founded on any exception. Instead of discussing that assignment, plaintiff's counsel discuss under the heading referring thereto an alleged erroneous finding of the Court with respect to the facts concerning the consideration for the notes, which alleged finding is not among the findings of fact made by the Court, nor is any such language as is here alleged, to be found in the opinion. Plaintiff sets up a list of things on page 42 of his brief, said to have been done by him and to be what the Court should have found to constitute the consideration for the notes. These things are put in a more or less distorted form, and the one numbered V is merely ridiculous. The consideration for the notes was, of course, as the lower court has found, the agreement, made and afterwards carried out by the Macomber-Savidge Lumber Company, to turn over its claim in a reduced amount to the Board of Trade, and to join with the other creditors in the plan for refinancing. As to allowing Menefee's indebtedness to be a preferred lien, there was no such indebtedness at the time. Menefee was to be induced if possibl to loan $250,000 of new money. As to allowing the other creditors to share in the lien of the second mortgage, there was no second mortgage, and would be none unless all the creditors participated, and it

might just as well be said that the other creditors were allowing the Macomber-Savidge Lumber Company to share therein. The balance of $17,000 omitted from the mortgage consisted mostly of a claim of $5000 for a commission which was not owing, and for which the undisputed testimony shows there was not the slightest basis (Transcript, p. 142), and a claim of $12,000 for a certain alleged shortage which did not exist (Transcript, p. 268). The same arrangement regarding credit and the taking of a second mortgage was made by all the rest of the 109 creditors whose aggregate claims amounted to abount $110,000. The arrangement was made by all parties because it was considered advantageous. Macomber's interest in his company was a 23% interest (Transcript, p. 128). Before he could get anything out of it as a stockholder, the debts would have to be paid, and the Company was insolvent. The indebtedness held by his company represented about 40% of the total indebtedness of the Modoc Lumber Company, and he owned less than one-fourth of the stock in this company. On that basis, Mr. Goldthwaite should have distributed his notes for $500,000 around among the remaining creditors and stockholders for their consent to the refinancing if they were to be treated on the same footing as Mr. Macomber claims he was being treated. It is to be observed that the things done and now alleged as a consideration were things done by the Macomber - Savidge Lumber Company. Plaintiff could not individually postpone the due date of the

Modoc Lumber Company's account or allow Menefee's indebtedness to be a preferred lien, or allow the other creditors to share in the lien of the second mortgage, or divide the company's claim into two parts. All these things, insofar as they were done, were done by the company—acting by him as its managing agent, it is true—but nevertheless done by the Company. And it was only as the Company might suffer loss thereby, that Macomber, owner of less than 25% of the stock, might indirectly suffer a consequential loss. While the discussion found under point II of plaintiff's brief can not ~~be~~ possibly, in the state of the record, be considered by the Court for the purpose of showing any error in the court below, the matter is valuable as constituting an admission as to what the true consideration for the notes was; and it comes very near to admitting that the consideration was just what is alleged in the answer. It would serve to cure the alleged error in receiving testimony to show such to be the case, if there had been any error therein.

POINT III OF PLAINTIFF'S BRIEF.

Plaintiff announces as the subject of discussion the question whether the testimony shows any evidence of suretyship. As we have pointed out in our preliminary discussion, none of the assignments VII to X inclusive is founded on any exception taken in the court below, and there are no exceptions in the record under which the question

here to be debated is put in issue. The discussion is therefore rather academic. The court may be better satisfied to know, before dismissing these assignments because there are no exceptions to support them, that the allegations of error possess no merit whatsoever when examined in the light of the facts. There is not only evidence of suretyship in the record, but such evidence is abundant. We will be as brief as we can in summarizing it.

1. It is undisputed that the Modoc Lumber Company was indebted to the Macomber-Savidge Lumber Company in an amount approximately equal to or exceeding the total of the notes at the time they were given.

2. It is undisputed that Macomber was at the time the president of the creditor company, and Goldthwaite was the president of the debtor company and its principal stockholder.

3. It is undisputed that the notes were given in connection with the adjustment of the account between the two companies. Such is not only admitted and testified to by both parties, but it appears on the face of the writing (Defendant's Exhibit B); and the copy of said writing which defendant received (Defendant's Exhibit F; Transcript p. 151) was written and signed by the plaintiff on the letterhead of the company.

4. The memorandum (Defendant's Exhibit B), executed simultaneously with the notes and forming a part of the one entire transaction, expressly

provides that any and all payments made on the aforesaid indebtedness of the Modoc Lumber Company to the Macomber-Savidge Lumber Company are to apply against the notes. That circumstance of itself, linked to the circumstance listed above under 1, 2, and 3, is in our opinion sufficient to justify the finding of the court that the Goldthwaite notes stood as collateral security to the Modoc Lumber Company debt. If one debt was not collateral to the other, why should payments on one be credited on the other?

5. At the time the notes were signed, Macomber was acting on behalf of his company in the adjustment of its business affairs with the Modoc Lumber Company. He so testified himself, as shown at p. 114 of the Transcript: "At the same time I came to some agreement concerning the amount of that indebtedness with Mr. Goldthwaite **on behalf of my company.**" It is true, that he crawfished and squirmed and tried to say afterwards that he did not act on behalf of his company in the adjustment, and that nobody did. In support of this, he claimed to have done no business on its behalf December 15, 1921, the date of the Crittenden agreement, which false pretense was abundently disproved. For instance, on February 21, 1922, he, as President, executed the Sanborn assignment (Transcript, pp. 326, 333). On May 25, 1922, he, as president, executed the assignment of his company's claim against the Modoc Lumber Company to the Board of Trade (Defendant's Exhibit No. 1,

Transcript, p. 283) as he admits on the witness stand (Transcript, p. 125). He represented his company in the meeting of creditors at the Board of Trade the day after the notes were signed, or the same day (Transcript, p. 121). He instructed Mr. Sanborn, the trustee, as to the amount for which he should file the claim with the Board of Trade (Transcript, p. 122). He raised no question at the time that he was representing his company (Goldthwaite's testimony, Transcript, pp. 146, 149). He admits writing letters on behalf of his company after the date of the Crittenden agreement (Defendant's Exhibits C and D, Transcript, pp. 116, 117). As the representative of his company, he was elected a member of the Creditors' Committee of the Board of Trade on or about March 1, 1922 (Kent's testimony, p. 247); and later became chairman of the committee. He continued to handle the business connected with the sale of the lumber on hand in the yard all through the months of January, February, and March, 1922 (Kent's Testimony, pp. 248, 249). He personally, with his own hand, made the adjustment of the account with Mr. Goldthwaite on March 1st, 1922, as shown on the face of Defendant's Exhibit E (Transcript, pp. 146-148), striking out the disputed items, as shown by Mr. Goldtwaite's testimony at pages 149 and 150, thereby reducing the claim down to $53,905.92, and he agreed then and there to present the claim to the Board of Trade as thus cut down (p. 149). Indeed Macomber says in his own testimony at page 123:

> I understand at the time that the notes were signed that the claim of the Macomber-Savidge Lumber Company against the Modoc Lumber Company was to be filed with the Board of Trade in the amount of $53,905.92, and that was a part of the understanding that I came to with Mr. Goldthwaite at the time the notes were signed.

He went to the Board of Trade meeting one hour later (p. 154) and had the Macomber-Savidge Lumber Company, with himself as its representative, elected a member of the committee (Brainard's testimony, p. 280). He admits at the foot of page 121 that he went before the Board of Trade meeting that day **on behalf of the Macomber-Savidge Lumber Company.** How in the world could it have been a part of the understanding that the claim was to be filed with the Board of Trade in the reduced amount of $53,905.92, the exact amount for which he had adjusted it with his own hand, unless he made that agreement on behalf of his company with Mr. Goldthwaite? He admits at page 121 that his company was engaged in the liquidation of its affairs through Mr. Sanborn "and the only part I took was that which was necessary to complete unfinished business." The adjustment and the obtaining of security for this disputed account were just as much unfinished business as anything else. The pretense now made on his behalf that he was only giving his personal consent that his company might reduce the claim if it saw fit and file it with the Board of Trade, and that he

got $50,000 in notes for such personal consent, is as barefaced a sham and subterfuge as any one ever attempted to put over on a court.

6. The consideration for the notes came from the Macomber-Savidge Lumber Company and was, to wit, that the company would cut down the face of its claim below $54,000, and place it in the hands of the Board of Trade and participate in the refinancing plan. Plaintiff chose to leave the facts as to what the consideration for the notes was shrouded in mystery to the close of the trial. Nowhere in his pleading or in his testimony was there a hint respecting it, excepting as the facts surrounding the transaction and the terms of the contemporaneous writing pointed strongly to what it must have been. Even in the face of defendant's testimony that the consideration was nothing else than what the defendant had set forth in his answer, the plaintiff elected to sit stubbornly mute in the court room. When defendant testified that there was no consideration except the one set forth in his answer, plaintiff's attorney did not even cross-examine him on the point. Defendant's testimony as to what the consideration was stands uncontradicted, and it is confirmed by every circumstance of the case. Plaintiff's attorneys have now in their brief abandoned the thin cover of the **prima facie** presumption of consideration and have undertaken to state what the consideration was. It is elementary law that when the plaintiff once sets forth what he claims the consideration to have been, room

for any presumption for his benefit that it was anything else is gone. He must then recover on the ground that he has alleged, or not at all. When the plaintiff, driven from cover, at last undertakes to allege the actual consideration for the notes, he is not able to point to anything except a consideration wonderfully like the one defendant has set up in his answer. These admissions point to just one thing as the consideration, to wit, the concessions made at the time the notes were executed concerning the claim of the Macomber-Savidge Lumber Company against the Modoc Lumber Company. Plaintiff admits now at least that the consideration was connected with said concessions. Mr. Goldthwaite has testified at page 153 that there was no consideration for the notes excepting these concessions by the Macomber-Savidge Lumber Company. This testimony stands uncontradicted. Plaintiff did not take the stand and testify what the consideration was or to deny the testimony of the defendant that it was just what the defendant had set up in his answer, and nothing else. Defendant also testified on this same point, (p. 153) and his testimony likewise stands undisputed, that at the time the the notes were given he did not personally owe Mr. Macomber any money and that Macomber never loaned any money to him.

7. The defendant has testified that the notes were given as collateral security to the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company. At page 152 appears his testi-

mony that he protested to the plaintiff at the time the notes were given that the indebtedness was a debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, and that defendant's notes ought therefore to run to the latter corporation. In response to which the plaintiff "outlined to me again as he had, on a number of occasions past the fact that he was having a great deal of trouble with his other partners in the Macomber-Savidge Lumber Company; that he had had trouble with his first assignee, Crittenden, that he didn't know how the new assignee, Sanborn, was going to act, and that he desired if possible to have these notes in his own name in case any trouble arose in the future where he could have the whip hand, or dominate the situation, within his own company. He went into some extensive length impressing me with the situation."

Defendant further testified on cross-examination, in response to questions put by plaintiff's attorney (p. 211) that there was no discussion between plaintiff and himself as to his giving plaintiff individual compensation for the purpose of getting his company into the San Francisco Board of Trade; and that (p. 221) the transactions were purely a business deal between the two companies and had nothing personal in them; that (p. 224) defendant did not expect to pay the notes himself, but expected the company to pay them, and that the notes were collateral; and that (p. 226)

A. * * * As far as assuming any personal liability in the matter, to Mr. Macomber's company, I had previously told him that I was unwilling personally to assume anything more than I believed the actual amount to be, and that was something less than fifty thousand dollars; and at the same time the subject of the second mortgage was under consideration. We were very desirous of putting it through, planned on putting it through, and it was my desire naturally to have my notes protected by the second mortgage notes. In other words, to have the second mortgage notes between me and the payment. * * *

Q. It seems from what I understand of what you say, you regarded these notes as a company agreement with another company?

A. No, it was my agreement to protect the Macomber-Savidge Lumber Company to the amount of $50,000, providing that sum was not paid in some other form through the Board of Trade.

Q. Personally, then your signature as an individual was all right, but the complaint you make is that the notes should have run to the Macomber-Savidge Lumber Company as payee, instead of Mr. Macomber as an individual?

A. No question about that. I protested at the time and told him so.

* * * *

Q. Why did you make the sum total of your ten promissory notes $50,000, instead of fifty-three thousand and some odd dollars?

A. I think I just explained that a moment ago; that I was unwilling to give a personal guaranty for any more than I believed the company owed.

Not one of these statements of the defendant, elicited either on direct or cross-examination, as to what took place between himself and the plaintiff respecting the notes, was contradicted in any particular by the plaintiff on the witness stand.

It is uncontradicted that the parties had previously met on February 28th and discussed the affairs of their two companies, and tried to reach an adjustment. It seems probable that Macomber prepared the memorandum (Defendant's Exhibit B) on that day, as it bears that date. It is uncontradicted that they had had, prior to the time the notes were signed, a conversation in which Macomber had asked Goldthwaite to go security for his corporation's debt, and Goldthwaite had told him that he was unwilling to become security for more than he believed to be actually owing. It is uncontradicted that when Macomber laid the notes before Goldthwaite for his signature, the latter protested that they ought to run to the Macomber-Savidge Lumber Company, and that Macomber's answer was that he was having a great deal of trouble with his other partners in the Macomber-

Savidge Lumber Company, that he had trouble with Crittenden, and he did not know how Sanborn was going to act, and that he desired, if possible, to have these notes in his own name in case any trouble arose in the future, so he could have the whip hand, and dominate the situation within his own company. That statement of Macomber's, **which he does not deny making,** was not sufficient to convert the notes from collateral security for the debt of his corporation, as Goldthwaite understood they were to be, into notes given for Macomber's personal benefit. When Goldthwaite said that the notes ought to run to the corporation, Macomber did not dispute that statement, nor say, No, it must be understood between us definitely now that these notes are not taken as collateral to the debt due the Macomber-Savidge Lumber Company, and that they are given for my sole personal benefit. He said nothing of that kind. His answer conceded the fact that the notes were taken for the benefit of his corporation, but he gave plausible reasons why he wanted them in his own individual name. By having the notes in his own name, he would have the advantage of controlling any litigation to collect them, and presumably the money would pass through his hands, if it ever became necessary to collect these collateral notes.

Please remember that almost all the direct testimony as to the notes having been given as collateral security and as to what was said between the plaintiff and the defendant in respect to the defendant

giving such security, was elicited by the plaintiff's own attorney on cross-examination and is in the record without any objection, motion to strike or exception thereto.

Plaintiff seeks to brush all this testimony aside by the quotation on page 44 of his brief of a question and answer in which defendant stated that the notes were not discussed at all. What is plainly meant is that the details of them, such as the Court was asking about, were not discussed.

We come now to that part of plaintiff's brief in which the argument is made that the subsequent payment of the notes, amounting to $53,905.92, which were given to the Board of Trade by the Modoc Lumber Company to represent its debt to the Macomber-Savidge Lumber Company, effected no discharge of the Goldthwaite notes. That question is not even remotely suggested by any exception in the case. We assume that plaintiff is discussing it under his tenth assignment. As a matter of course, if the notes were given as collateral security to the debt of the Modoc Lumber Company, they were discharged when that principal debt was paid. The only thing peculiar in the situation is that the collateral notes were for a less amount than the principal debt. There have been other such cases. We call attention to the following:

Carson v. Reid, 137 Cal. 253.
Eddy v. Sturgeon, 15 Mo. 199.
Mark v. Schwartz, 14 Ore. 178.

1 Brandt on Surety (3 Ed.) Sec. 103.
Fidelity & Casualty Co. v. Van Dyke, 99 Ga. 543.
Burbank v. Buehler, 108 La. 39.

All these cases hold that when collateral security is given for a limited part of a principal debt, the collateral obligation will be discharged when such amount of the principal debt as the collateral security stands for has been paid, no matter whether it has remained in the hands of the original creditor or not.

The position of plaintiff's attorneys on this point, as stated on page 50 of their brief, is that:

> A consideration of the circumstances under which the agreement was made and the matter to which it relates, can lead to no other conclusion than that the parties had in mind only money payments to be made directly to the Macomber-Savidge Lumber Co. or to its trustee, Sanborn, because at the time it was made these were the only persons or obligations in which any direct payments could have been made.

As we read that sentence and many more of the same tenor in this section of plaintiff's brief, we are impelled to shout lustily that plaintiff is "varying the written contract" in a manner little short of mayhem. Where do his counsel get leave to insert the word "money" before the word "payments"? Where do they find Sanborn's name in the writing? On what footing, in the language of

the contract, do they justify their statement that only payments **"directly** to the Macomber-Savidge Lumber Company or to its trustee," were to be credited? The parties had in mind when the notes were delivered ,that the claim of the Macomber-Savidge Lumber Company was to be assigned to or at least handled and collected on behalf of the Macomber-Savidge Lumber Company by, the Board of Trade of San Francisco. It is mentioned in the writing. Why do plaintiff's counsel now cast it out of the reckoning and say that only payments **directly** to the Macomber-Savidge Lumber Company, or its assignee, Sanborn, were to count, when the Board of Trade **is** mentioned in the writing and Sanborn **is not.** When they bring Sanborn in, they recognize that payments to an assignee of the claim are just as effective as payments to the Macomber-Savidge Lumber Company. Why then do they read into the writing one assignee who is not mentioned and leave out the other prospective assignee who is mentioned? The plain sense of the writing, which plaintiff's counsel have not been able to keep from penetrating into their own minds when they mention Sanborn, is that all payments on the claim to a rightful holder thereof are to be credited against Goldthwaite's notes. It is the "claim of the Macomber-Savidge Lumber Company" that is mentioned, and all payments made on that claim to any rightful holder and no matter to whom made, are to be credited on the notes. Suppose Mr. Sanborn had resigned the office of trustee and his title to

the choses in action of the company had been transferred to a new assignee—would plaintiff's counsel question that payments to Sanborn's successor would have entitled Goldthwaite to have credit on the notes? We opine not.

Now suppose the Board of Trade with the consent of the creditors, including the Macomber-Savidge Lumber Company and Sanborn, its trustee, had transferred the notes representing the creditor's claim to a new representative of the creditors —some trust company for instance, as it might well have done—and the payment had been made to the new trustee instead of to the Board of Trade—would plaintiff's attorneys deny Goldthwaite the right to a credit for that payment? That is getting pretty warm, and we suppose they would squirm before they would answer that question. It is obvious however, that they would not have any footing to deny the credit. But that is practically what did happen, except that instead of transferring the claim to a new trustee to collect it for the creditor, the Board of Trade with the sanction of the creditor, sold and assigned the claim to a purchaser, who did afterwards collect it in full. It is payment of the **claim** which entitles Goldwaite to the credit, regardless of the question of who got the payment, so long as it was made to a rightful holder of the claim. We allege, in paragraph VI of our answer, that the notes were given on the understanding that "any and all payments made on any part of said indebtedness of

the Modoc Lumber Company to the Macomber-Savidge Lumber Company, whether on the part thereof so turned over to or handled through the Board of Trade of San Francisco, or the balance thereof not so turned over or assigned, should be credited against the said personal notes to be given by the defendant herein as a guaranty, up to the amount of defendant's said notes." This written agreement constitutes the proof of that allegation, and is quite sufficient therefor. It therefore follows that, independently of whether the notes were collateral security for the debt or not, this agreement between the parties, duly set forth in the answer, in conjunction with the fact, established and admitted, that the identical debt referred to, " translated into the Board of Trade notes," as plaintiff's counsel aptly said in the court below, was paid off, constitutes a complete defense to the notes.

After the arrangement was entered into for the representation of the Macomber-Savidge Lumber Company by the Board of Trade, its claim was assigned to G. W. Brainard, Secretary of the Board of Trade (Defendant's Exhibit No. 1, p. 283). In exchange for the mortgage notes of the Modoc Lumber Company and the Williamson River Logging Company, which the creditors were to get, the Board of Trade was required to certify that the debts had been satisfied. This was done by an instrument which appears at page 289, marked "Defendant's Exhibit M." The claim of the Macomber-Savidge Lumber Company was included in

this certificate of satisfaction. Mr. Brainard testified, as shown at page 295, that these notes were accepted at that time by the Board of Trade or by him as the representative of the creditors who had placed their claims in his hands, in settlement and discharge of the original claims. We think it is plain on the face of this transaction that that portion of the original debt of $53,905.92 covered by the mortgage notes given to the Board of Trade was completely wiped out and satisfied when the notes were accepted to cover the same. The foregoing is a question of fact, which is settled by the documentary evidence in the case; it appearing that one of the conditions of the arrangement was that the notes were to be taken in absolute satisfaction of the indebtedness. We do not say this for the purpose of making the claim that the giving of these notes amounted to a payment of more than $50,000 on the indebtedness in question; because we think the parties contemplated, at the time the notes were given, that such a change in the form of the indebtedness would be or might be made, and the notes were given as a collateral guaranty with that in view. Our point is, that the notes given to the Board of Trade were not given as collateral to the indebtedness for the open account of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, but said notes wiped out that much of the open account and constituted the only form in which said indebtedness up to the sum they covered, remained in existence.

In other words, they were thenceforth a part of the indebtedness—far the larger part thereof—to which Goldthwaite's notes stood as a collateral guaranty.

WHEN THE SECOND MORTGAGE NOTES HELD BY THE BOARD OF TRADE WERE SOLD AND TRANSFERRED BY THE BOARD OF TRADE TO THE L. B. MENEFEE INVESTMENT COMPANY, THIS CONSTITUTED AN ABSOLUTE TRANSFER BY THE BOARD OF TRADE OF THE CREDITORS' CLAIMS COVERED THEREBY.

The above proposition, it seems to us, follows as a matter of course from the fact that the claims were absolutely released in exchange for the notes. Even if this had not been so, the same result would have followed from the principle that, where notes have been given for a debt represented by an open account, a transfer of the notes operates as a matter of law to transfer the debt itself to the transferee. On this point, see Ellison v. Henion, 183 Cal. 171; 190 Pac. 793; 11 A. L. R., 444. In the course of the opinion the court said:

> But, on the other hand, the notes evidence the debt, and if they are transferred the debt is transferred with them, and the original creditor can thereafter maintain no action upon it. It no longer belongs to him. That the original debt for which a note has been taken passes with the transfer of the note was directly decided in Goldman v. Murray, 164 Cal. 419, 129 Pac. 462. There the plaintiff brought an action to recover from the defendant, as a stockholder of a certain corporation, his pro-

portion of a certain indebtedness of the corporation. It appeared that the corporation had been originally indebted for money advanced to it, and gave its note to its creditor for the amount. The creditor then transferred the note to the plaintiff. The trial court found the note to be invalid as against the corporation, because of want of authority for its execution, but found that the original indebtedness of the corporation had been assigned by the original creditor to the plaintiff, and granted a recovery upon it. On appeal, this finding of an assignment was attacked as not supported by the evidence. The only evidence on the point was that the note had been transferred to the plaintiff. It was held that this was enough; that the transfer of the note was in fact a transfer of the original debt as between the original creditor and the plaintiff, although the note was void as to the corporation. If the transfer of a void note be in effect an assignment of the indebtedness which it was intended to evidence, much more must the transfer of a valid note be in effect an assignment of the indebtedness which it does in fact evidence. See also 7 Cyc. 816; Harris v. Johnston, 3 Cranch, 317; 2 L. ed. 452; Looney v. District of Columbia, 113 U. S. 258, 28 L. ed. 974, 5 Sup. Ct. Rep. 463; Davis v. Reilly (1898) 1 Q. B. 1, 66 L. J. Q.B.N.S. 844, 77 L.T.N. S. 399, 46 Week, Rep. 96.

In the present case, there is no question as to the fact of the transfer of the notes taken for the indebtedness of the Woolen Company. They were, as we have said, indorsed and delivered to Pike by the payee, the representative of the Woolen Company's creditors, upon the payment to him of $5,000. The indorsements were special; that is, to the order of Pike. There is no escape from the conclusion that by this transfer the creditors part-

ed, not only with the notes, but with the debts from which the notes were given. In other words, when the plaintiffs brought this action, they were not the owners of or interested in the obligation whose guaranty they seek to enforce in one count, and the stockholder's liability pertaining to which they seek to enforce in the other.

The chop logic by which plaintiff's counsel seek to arrive at the conclusion that payments on the debt were not payments on the debt requires no answer.

Under point V, plaintiff makes the surprising statement that there is no finding by the lower court that sets forth that an amount equal to the total of the notes given to the Board of Trade by the Modoc Lumber Company has been paid.

In the 8th finding it is set forth that the claim of the Macomber-Savidge Lumber Company in the amount of $53,905.92 was assigned to the Board of Trade, and that the total of creditors' claims so assigned was $178,592.77.

In the ninth finding it is set out that notes were made and a mortgage was given to secure this debt. In the fourteenth finding it is definitely set forth that this indebtedness was paid in full. Nothing else can be said of the statement of plaintiff's counsel than that it is simply contrary to the fact. The same must be said of the next statement contained in point V as to there being no allegation in the answer that the consideration alleged in defend-

ant's affirmative defense was the sole consideration. Paragraph VI of the answer, shown on page 31 of the transcript, sets forth what defendant alleges were the consideration for the notes; and paragraph VII, shown on page 33, sets forth that the notes were made * * * "solely on the consideration aforesaid."

From the outset of this case we have insisted, and we still insist, that if the Court were to adopt the theory of the plaintiff in all respects and were to set aside the findings of fact made by the lower court as to what was the consideration for the notes, and were to find that the consideration was just what plaintiff's counsel say in their brief was the consideration, and that instead of giving his notes as collateral security to the debt of his corporation, Goldthwaite really gave notes for $50,000 to Macomber in consideration that Macomber should merely give his individual consent that the Macomber-Savidge Lumber Company might take the action requested by Goldthwaite, we say most confidently, that plaintiff nevertheless could not recover on the notes in any court of justice, for the reason that it would stand out on the face of the transaction that the consideration was wholly illegal. All the facts constituting this defense were pleaded in the answer, as we have pointed out, and it is a defense which does not need to be pleaded, when the facts appear. The law is plain.

A BARGAIN BY AN OFFICER OF A COR-

PORATION FOR A PERSONAL ADVANTAGE IN RETURN FOR ENTERING INTO AN AGREEMENT ON BEHALF OF THE CORPORATION WITH A THIRD PERSON IS INVALID.

II Page on Contracts, Sec. 1025:

> No action can be maintained on a contract by which A agrees to deliver something of value to B for B's personal benefit in order to influence B in his management of X's affairs as X's agent.

II Page on Contracts, Sec. 874:

> A contract by which a corporation conveys its property, and payment therefor is to be made to the stockholders of the vendor corporation, is illegal since it operates as a fraud upon the creditors of the corporation who are thus left without any fund from which their debts are to be paid.

III Williston on Contracts, Sec. 1737:

> A bargain by officer of a corporation for his personal advantage in return for entering into an agreement on behalf of the corporation with a third person, is invalid.

II Elliott on Contracts, Sec. 748:

> Agreements which tend to induce fraud or breach of trust on the part of persons standing in a fiduciary or confidential relation are void. Consequently, contracts the objects or necessary tendency of which place a party who owes a duty or obligations to third persons in a position inconsistent with such duties, are void, even though no breach of trust results.
>
> Sec. 749. Inducing Breach of Trust—Officers of Corporations. Chief among contracts of this character are those which tend to con-

> trol the discretion of officers of corporations. Generally speaking, a contract between an officer or director of a corporation and another, which places the officer or director in a position where he is under obligations inconsistent with the duty imposed upon him by reason of his official connection with the corporation, is voidable.

In Peckham v. Lane, 81 Kan., 849, a contract whereby the president of a railroad corporation was to receive a personal benefit for the location of a station at a particular place, was held illegal and void. We quote:

> The invalidity of a contract entered into in violation of this principle does not depend upon whether the trustee has intended an actual wrong or whether any injury has in fact resulted to the beneficiary. The purpose of the rule of law, like that of statutes of a similar nature, is "to spare weak human nature the strain of temptation and to discourage actual fraud by relieving the public from the task, always difficult, and often impossible, of proving it." ***
>
> We need not determine whether the contract here involved, if it had been made by Peckham on behalf of the company, could be enforced by him for its benefit, nor whether he could enforce it on his own account if he could show that he had contracted with the company for the right to do so by a fair agreement, and upon a sufficient consideration, since neither of these conditions is shown by the evidence. The contract on its face appears to be for his personal benefit and to be void for that reason. There is no occasion to presume that he was to take the title in trust for the company. A matter of that importance ought not to be left

for presumption, since the pleader necessarily has knowledge of all the facts and can readily set them out so explicitly as to leave no room for doubt.

McGuffin v. Coyle and Guss, 16 Okla., 648:

> We think that the true principle of law is that a note made payable to an officer of a railroad company in his personal capacity and for his personal benefit, on condition that a road is built on a certain line, to a certain point, by a certain time, is void as against public policy and that no recovery can be had thereon.

In Williams v. Kendrick, 105 Va. 791, the plaintiff and defendant made an agreement with a third person, who was agent for a seller of real property, whereby an option was procured for the purchase and sale of the property of the principal of said agent. It was agreed between the plaintiff and defendant, as partners, and the agent, that the profits arising out of the sale of the property so held under option should be divided one-half to the partnership and one-half to such agent. The property was sold and a profit realized. The agent received his half of the profits and the defendant received the partnership's half of the profits. The plaintiff sought to compel a division of the profits so obtained. It was held that the whole transaction was so tainted with illegality that no recovery could be allowed.

In Landes v. Hart, 131 N. Y. App. Div. 6, the plaintiff sued on a contract to recover $500 which

the defendant agreed to pay him in consideration that he, as director of another corporation, should secure the award of a contract to the defendant. The trial court submitted the case to the jury on the theory that if the plaintiff disclosed his bargain with the defendants to his co-directors before the contract was awarded to the defendants by the directors, he could recover. It was held that this instruction was error, the court saying:

> An agreement which is designed or which in its nature and effect tends to lead persons who are charged with the performance of trusts or duties for the benefit of others, to violate or betray them, is contrary to public policy and cannot be enforced.

In Fletcher on Corporations, we find the following statements of the law:

Section 2272:

> 1. Directors and other officers must exercise the utmost good faith in all transactions touching their duties to the corporation and its properties. * * *
>
> 2. All their acts must be for the benefit of the corporation, and not for their own benefit, except as hereinafter stated (the exceptions not applying to the present case.)
>
> 3. They are not permitted to profit as individuals by virtue of their position.

Section 2310:

> Contracts as contrary to public policy. A contract between an officer of a corporation and a third person is contrary to public policy,

> and therefore illegal and void, where it contemplates a fraud upon the corporation, or where, by giving the officer a secret profit or personal advantage, or otherwise, it places his private interests in conflict with his duty to the corporation. Such a contract, therefore, cannot be enforced by either party, and may be rescinded by the corporation. In any event, this is the rule where the contract is executory. Thus, where a person contracted with a railroad company to construct its road for a certain per cent. of the cost of construction, and thereafter on the same day contracted with five of the seven directors of the road to pay them two-thirds of such per cent, the two contracts are to be treated as pari materia and as constituting one contract which is void as against public policy, and the contractor cannot sue for failure to carry out the contract, under the rule that where an illegal contract is executory neither party can ask the aid of a court to enforce it.

Among the cases cited in support of this doctrine is West v. Camden, 135 U. S. 507, in which the defendant was sued for damages for breach of an agreement he had made with plaintiff that plaintiff should be permanently employed by a certain corporation of which defendant was an officer and majority stockholder. The consideration for the agreement was the conveyance of certain property to the corporation. Notwithstanding that there was no direct private gain to the defendant involved in the transaction, the Supreme Court held the agreement to be void as contrary to public policy, because it **tended to put the defendant in a position where he would not exercise on behalf of**

the corporation his unbiased personal judgment as to its best interests. See the opinion of the court at pages 520 and 521.

The statement of Mr. Fletcher as to the law on this point is sustained by all the following cases which he cites, and which we have examined and found to be directly in point:

Linder v. Carpenter, 62 Ill., 309.
Bester v. Wathen, 60 Ill., 138.
Noel v. Drake, 28 Kan., 265, 42 Am. Rep., 162.
Guernsey v. Cook, 120 Mass., 501.
Wilbur v. Stoepel, 82 Mich., 344, 21 Am. St. Rep., 568.
Lum v. McEwen, 56 Minn., 278.
Attaway v. Third Nat. Bank, 93 Mo., 485.
Koster v. Pain, 41 App. Div., 443, 58 N. Y. Supp. 865.
Donald v. Houghton, 70 N. C., 393.
Kelsey v. New England St. Ry. Co., 62 N. J. Eq., 742.

In Guernsey v. Cook, it was held that a contract by which a shareholder in a corporation, in consideration of the purchase of a part of his stock at a price named, agreed to secure to the purchaser the office of treasurer of the corporation with a fixed salary, and in case of his removal, to repurchase the stock at par, is void as against public policy, and is a fraud on the other members of the corporation, in the absence of evidence that the transaction was not for the private benefit of the

shareholder or that it was consented to by the other members of the corporation. The court said, at page 502:

> It was the purpose and effect of the contract to influence the defendant in a decision affecting the private rights of others by considerations foreign to those rights. The promissee was placed under direct inducement to disregard his duties to other members of the corporation who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence, which required him to look only to the best interests of the whole, uninfluenced by private gain. The contract operated as a fraud upon his associates. In Fuller v. Dame, 18 Pick., 472, a contract was held to be contrary to public policy and to open, upright, and fair dealing, which tended injuriously to affect the interests of the corporations of which the promissee was a member. It was compared to the case of a composition deed where all the creditors release the common debtor upon the payment of a certain percentage, and where stipulation for a separate and distinct advantage is held to be a fraud on other creditors, and void. * * * The objection that the contract is illegal * * * is allowed to prevail * * * for the sake of the public good, and because the court will not lend its aid to enforce an illegal contract.

In Kelsey v. New England St. Ry. Co. the court said:

> The members of the committee, being themselves directors of the company, as well as representatives of the board of directors, occupy a fiduciary position in which they are practically to be regarded as trustees for the stockhold-

> ers as cestuis que trust (citing cases). Acting in this capacity, they were not at liberty to use their power of bargaining for the corporation so as to secure for themselves an exclusive personal benefit. If they did so use their authority, their transaction was voidable against a person unknowingly participating in their abuse of power. (Citing authorities).

In Lum v. McEwen, the latter was superintendent and general manager of the business of a mill company. He had received a promissory note for $5000.00, signed by Lum, in consideration that McEwen would use his influence and authority to secure the removal by the company of its mill to a certain place, and the extension of its logging road to that place. The note had been taken in the name of a third party, one Clark, and it contained the precious words, "For value received." These circumstances did not deter the court from permitting the facts as to consideration and beneficial ownership to be proved. McEwen did advise the company to remove the mill and construct the road, and it did so. It was shown that the receiving of the note had not influenced his action, nor had his recommendation influenced the mill company in the matter. The Supreme Court of Minnesota nevertheless held that the note was void, saying, at page 282:

> That this contract was illegal and void on grounds of public policy will not admit of a moment's doubt. Loyalty to his trust is the first duty which an agent owes to his principal. Reliance upon an agent's integrity, fidelity,

and capacity is the moving consideration in the creation of all agencies; and the law condemns as repugnant to public policy, everything which tends to destroy that reliance. The agent cannot put himself in such relations that his own personal interests become antagonistic to those of his principal. He will not be allowed to serve two masters without the intelligent consent of both.

Actual injury is not the principle the law proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. In the matter of determining the policy of removing the mill and extending the road, McEwen, in the discharge of his duties, whether merely that of making recommendations, or of exercising authority to act, owed to his principal the exercise of his best judgment and ability, uninfluenced by any antagonistic personal interests of his own. His attempt to secure $5000 to himself was calculated to bias his mind in favor of the policy upon which the payment of the money was conditioned, regardless of the interests of the mill company. It is not material that no actual injury to the company resulted, or that the policy recommended may have been for its best interest. Courts will not inquire into these matters. It is enough to know that the agent in fact placed himself in such relations that he might be tempted by his own interests to disregard those of his principal.

The transaction was nothing more or less than the acceptance by the agent of a bribe to perform his duties in the manner desired by the person who gave the bribe. Such a contract is void.

> This doctrine rests on such plain principles of law, as well as common business honesty, that the citation of authorities is unnecessary. The doctrine is perhaps as clearly and concisely expressed as anywhere in Harrington v. Victoria Graving Dock Co., 3 Q. B. Div. 549. The fact that the validity of such transaction is attempted to be sustained in courts of justice does not speak well for the state of the public conscience on the subject of loyalty to trusts in business affairs.

In the case of Oscanyon v. Arms Co., 103 U. S. 261, the answer contained nothing but a general denial. Nevertheless the court acted on the opening statement of plaintiff's counsel, in which facts were stated disclosing the illegality of the consideration for the contract sued on. This action of the court was alleged as error on the appeal. In passing on the point, the Supreme Court said (p. 266):

> The position of the plaintiff that the illegality of the contract in suit cannot be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worth of serious consideration had it not been earnestly pressed upon our attention by learned counsel. The theory upon which the action proceeds is that the plaintiff has a contract, valid in law, for certain services. Whatever shows the invalidity of the contract, shows that in fact no such contract as alleged ever existed. * * *
>
> But if we are mistaken in this view of the system of procedure adopted in New York, and of the defences admissible according to it under a general denial in an action upon a con-

tract, our conclusion would not be changed in the present case. Here the action is upon a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law. * * *

The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, ex dolo malo non oritur actio, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.

Plaintiff, as we have remarked several times, owned less than one-fourth of the stock of his Company, and he suffered no injury by the grant-

ing of the concessions made on its behalf, excepting such as the other stockholders suffered, if it should be granted that the arrangement worked an injury rather than a benefit. He was the president and a director of the company. He was engaged in attending to the business connected with the liquidation of his company up to and after the time these notes were given. His attorneys make the startling suggestion that he could not bargain away his corporation's rights, because he had no **authority** to do so. If those rights were what he professed to be bargaining away and he acted without authority, that would leave the notes, on the footing of plaintiff's own declaration as to lack of authority, standing without any consideration whatever. If the court should adopt the contention in the plaintiff's brief, that the consideration was only Macomber's personal consent that his company should, through its trustee, grant the concessions which were asked, plaintiff's position would not be one whit better. It was as illegal for him to bargain away his personal consent while he was an officer and director and a member of a committee of two handling the liquidation of the corporation and advising the trustee in respect thereto, as to bargain away the consent of his corporation itself. His attorneys say he did bargain away his own personal consent under just those circumstances. In such case, the law is strict that not even the appearance of evil will be tolerated.

When it is conceded in the pleadings, and un-

disputed as a fact, that Macomber, at the time he took the notes, was president of his corporation: and when it is deliberately asserted on his behalf by his own counsel to be a fact—which we will concede to them, because they want it conceded—that he was a member of the committee of two which had been appointed by all the stockholders and officers to represent them in the liquidation of the affairs of the corporation and to advise the trustee in respect thereto; and when it is shown that his claim that he had ceased to do business for his corporation is false, and that on the contrary, he was transacting for it all the business it was doing; and when it appears unescapably that he and no one else acted for his corporation in the very transaction out of which the notes arose; and when it appears that the only actual consideration his counsel can even allege on his behalf, to sustain the notes, and the one they do allege, is the granting by him of the concessions which the Macomber-Savidge Lumber Company made respecting its creditor's claim against the Modoc Lumber Company,—then what are the consequences? It needs no argument to reach a conclusion on that point. Plaintiff says the notes are his own, sole, individual notes, in which his corporation has not the slightest interest. If he recovers at all, it must be on the theory he himself has adopted. If the notes were given for his sole personal benefit, and the consideration is what it is demonstrated and admitted to be, the notes are illegal, and that is

the end of the matter. The lower court so found. The fifth conclusion of law made and filed by the court below reads as follaws:

> If the said promissory notes sued on herein were given by the defendant to the plaintiff personally in consideration of any action which the plaintiff took on behalf of the Macomber-Savidge Lumber Company, of which he was the president, said notes are void and uninforcible for illegality of consideration.

The transcript filed in this court includes only the first first four conclusions of law. We have moved to supply the deficiency.

CONCLUSION.

Several things must have become evident to the Court by this time. Those are:

1. That this is one of the most baseless appeals ever taken. Out of the thirteen assignments of error only three are founded on any exceptions. Of those three, the first objection was to a question which was not answered; and all three exceptions are plainly without merit. The case turned entirely on questions of fact. The facts, and the law as well, have been found in favor of the defendant. There was abundant evidence to justify the findings and there are no exceptions thereto.

2. That the case of the plaintiff is not only without merit, but is utterly dishonest in its fun-

damentals. He knows as well as every one else knows that his claim as now made by his counsel that he, the holder of less than a quarter of the stock of an insolvent corporation, was to have $50,000 for merely giving his individual consent that his corporation might if it saw fit enter into the same plan of refinancing which all of the other creditors were joining in, is utterly preposterous and false. It is to be observed moreover that the very things plaintiff's counsel now set up as the basis of the consideration for the notes are things which the defendant has denied under oath in his reply ever happened. The answer explicitly sets up the facts as to the agreement that the claim should be filed with the Board of Trade and reduced to $53,905.92, and the subsequent action by which this arrangement was carried out. The reply absolutely and flatly denies that any such things ever happened. Now the plaintiff pretends that his individual consent to the doing of those things which he has denied under oath were ever done or agreed to be done was the consideration for the notes. He sets up now his consent to the taking of the second mortgage as part of the consideration. He had not only denied in his reply that there was such an agreement, but he had denied on the witness stand that it was even discussed prior to the giving of the notes. See foot of page 123, for instance.

3. If the notes belong to the plaintiff individually and the consideration was what he says it was,

it is then inescapable that the notes were void for illegality of consideration. It is uncontradicted that Goldthwaite wanted to give the notes to the Macomber-Savidge Lumber Company. Plaintiff now asks the Court to find that he was utterly dishonest and false to his trust as president and director and one of the liquidating committee of his corporation, and that when he was offered security for the debt due the corporation, he refused it and insisted on having instead a bribe for himself personally. Such a case does not deserve a moment's favorable consideration.

Respectfully submitted,

VEAZIE & VEAZIE,,

Attorneys for Defendant in Error.

No. 5129

United States

Circuit Court of Appeals

For the Ninth Circuit.

DOLLAR STEAMSHIP LINE, a Corporation,
Plaintiff in Error,

vs.

JEANNETTE A. HYDE, United States Collector of Customs, Port of Honolulu,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Plaintiff:

DOLLAR STEAMSHIP LINE, a Corporation.

Messrs. THOMPSON, CATHCART & BEEBE, Honolulu, Hawaii.

For Defendant:

JEANETTE A. HYDE, United States Collector of Customs, Port of Honolulu.

SANFORD B. D. WOOD, Esq., United States District Attorney, Federal Building, Honolulu, Hawaii.

CHARLES H. HOGG, Assistant United States District Attorney, Federal Building, Honolulu, Hawaii. [1*]

In the District Court of the United States for the Territory of Hawaii.

No. 170.

DOLLAR STEAMSHIP LINE, a Corporation,
Plaintiff,

vs.

JEANETTE A. HYDE, United States Collector of Customs, Port of Honolulu,
Defendant.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

CLERK'S STATEMENT.

Time of Commencing Suit.

July 29, 1926: Complaint filed and summons issued and delivered to the United States Marshal for the District of Hawaii.

Names of Original Parties.

Dollar Steamship Line, a corporation, plaintiff.

Jeanette A. Hyde, United States Collector of Customs, Port of Honolulu, Defendant.

Dates of Filing of Pleadings.

July 29, 1926: Plaintiff's bill of complaint.

October 21, 1926: Plaintiff's amended bill of complaint.

December 13, 1926: Plaintiff's second amended bill of complaint.

February 21, 1927: Election of plaintiff to stand on pleadings.

Service of Process.

July 29, 1926: Summons issued and delivered to U. S. Marshal, District of Hawaii, and same date was returned with the following return, to wit: [2]

"United States Marshal's Office,
City of Honolulu, Territory of Hawaii.

I HEREBY CERTIFY, that I received the within writ on the 29th day of July, A. D. 1926, and personally served the same on the 29th day of July, A. D. 1926, upon Jeanette A. Hyde, United States Collector of Customs, Port of Honolulu, by delivering to, and leaving with Jeanette A. Hyde

said defendant named therein personally, at Honolulu, T. H., a certified copy thereof, together with a copy of the complaint certified to by Wm. L. Rosa, Clerk, attached thereto.

OSCAR P. COX,
U. S. Marshal.
By (Sgd.) O. F. Heine,
Office Deputy.

Honolulu, July 29th, A. D. 1926."

Time When Proceedings Were Had.

August 27, 1926: Proceedings at argument on demurrer to complaint.

December 10, 1926: Proceedings at argument on motion to strike and demurrer to amended complaint. Decision sustaining same.

January 21, 1927: Proceedings at argument on demurrer to second amended complaint. Decision sustaining same.

February 21, 1927: Proceedings, decision on demurrer to second amended complaint and exceptions.

Dates of Filing Appeal Documents.

February 28, 1927: Petition for writ of error and allowance, assignment of errors, bond filed. Writ of error and citation issued.

March 1, 1927: Praecipe for transcript of record filed. Proceedings had before the Honorable J. T. DeBolt, District Judge, presiding. [3]

CERTIFICATE OF CLERK AS TO THE ABOVE STATEMENT.

United States of America,
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause; the names of the original parties thereto, the several dates when the respective pleadings were filed; an account of the service of process, the time when proceedings were had and the name of the judge presiding and the date of filing appeal documents.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of April, A. D. 1927.

[Seal] WM. L. ROSA,
Clerk, United States District Court, Territory of Hawaii. [4]

[Endorsed]: Filed March 24, 1927, at 9 o'clock and —— minutes A. M. [5]

[Title of Court and Cause.]

ENLARGEMENT OF TIME TO AND INCLUDING APRIL 24, 1927, FOR DOCKETING CASE.

For good cause shown, the time within which to docket this case and file the record thereof with the

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit is hereby enlarged and extended to and including April 24, 1927.

Dated at Honolulu, T. H., March 24, 1927.

J. T. DeBOLT,

Judge, United States District Court, Territory of Hawaii. [6]

[Endorsed]: Filed April 14, 1927, at 10 o'clock and —— minutes A. M. [7]

[Title of Court and Cause.]

ENLARGEMENT OF TIME TO AND INCLUDING APRIL 30, 1927, FOR DOCKETING CASE.

For good cause shown, the time within which to docket this case and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit is hereby enlarged and extended to and including April 30, 1927.

Dated at Honolulu, T. H., April 14, 1927.

J. T. DeBOLT,

Judge, United States District Court, Territory of Hawaii. [8]

[Endorsed]: Filed July 29, 1926, at 2 o'clock and 8 minutes P. M. [9]

In the United States District Court for the Territory of Hawaii.

DOLLAR STEAMSHIP LINE, a Corporation,
Plaintiff,

vs.

JEANETTE A. HYDE, United States Collector of Customs, Port of Honolulu,
Defendant.

COMPLAINT.

Action to Recover Moneys Paid Under Protest.

Comes now the plaintiff above named and for cause of action against the above-named defendant alleges:

I.

That at all times hereinafter mentioned plaintiff has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, and authorized to do and doing business in the Territory of Hawaii and within the jurisdiction of this court.

II.

That at all times hereinafter mentioned the defendant, Jeanette A. Hyde, has been and now is the duly appointed, qualified and acting United States Collector of Customs, Port of Honolulu, Territory of Hawaii, a resident of said Honolulu and within the jurisdiction of this court.

III.

That at all times hereinafter mentioned the plaintiff has been and now is the owner and operator of various steamships, one of said steamships being the SS. "President Lincoln" and [10] engaged in the business of carrying mails, passengers and goods, for hire, between various ports of the United States, including the port of Honolulu, Territory of Hawaii, and ports of foreign countries; that at the time of the commission of the illegal act hereinafter complained of, there was subsisting between the plaintiff and the United States of America and various individual shippers valid and binding contract for the carriage, for hire, of mails and various commodities, between the ports of the United States of America and ports of foreign countries, and return.

IV.

That on or about the 17th day of November, A. D. 1925, at Yokohama, Japan, one Seiichi Yamate, an alien holding a permit to re-enter the United States of America, said alien having been a resident of and domiciled in the Territory of Hawaii for a continuous period of eighteen years, said residence and domicile having been unrelinquished and said alien being desirous of returning thereto, became a passenger for hire aboard the SS. "President Lincoln," said vessel being bound for the port of San Francisco, California, via the port of Honolulu, the destination of Seiichi Yamate being Honolulu, Territory of Hawaii.

V.

That on the 26th day of November, A. D. 1925, said vessel arrived at said port of Honolulu, and said alien passenger was refused admission to said port and to the United States of America for the alleged reason that said alien was afflicted with a loathsome and/or dangerous contagious disease. [11]

VI.

That immediately upon the exclusion of said alien as aforesaid, said defendant, Jeanette A. Hyde, Collector of Customs, as aforesaid, purporting to act under the provisions of Section 9 of the "Immigration Act of 1917" as amended by Section 26 of the "Immigration Act of 1924," and despite the fact that said alien was returning to an unrelinquished United States domicile in excess of seven consecutive years, and despite the proviso to said Section 9 of said "Immigration Act of 1917" as amended by Section 26 of the "Immigration Act of 1924" reading:

> "That nothing contained in this section shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions to Section 3 of this Act exempted from the excluding provisions of said section,"

and the proviso to said Section 3 of the "Immigration Act of 1917" reading:

> "That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be ad-

mitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe,"

imposed against said defendant a fine of One Thousand Dollars ($1,000.00) and in addition a sum equal to that paid by said alien for his transportation from the initial point of departure, indicated in his ticket, to the port of Honolulu, to wit, Forty Dollars ($40.00), or a total of One Thousand Forty Dollars ($1,040.00). [12]

VII.

That upon the imposition of said fine and for the purpose of effecting collection of the same, said defendant threatened to refuse clearance papers to said SS. "President Lincoln" and thereupon to effect the clearance of said vessel and to prevent inconvenience to the passengers aboard said vessel, and a breach of its mail and merchandise contracts, plaintiff paid to said defendant as collector as aforesaid, under duress and protest, said fine of One Thousand Forty Dollars ($1,040.00) so illegally imposed and collected as aforesaid; that although demand has been made upon said defendant for the return of said sum of One Thousand Forty Dollars ($1,040.00), said defendant has wholly failed, refused and neglected to repay the same or any part thereof to the plaintiff.

WHEREFORE, plaintiff prays judgment against defendant in the sum of One Thousand Forty Dollars ($1,040.00), together with interest at the legal rate from the date of payment, together with its costs and disbursements herein expended.

Dated: Honolulu, T. H., July 29, 1926.

DOLLAR STEAMSHIP LINE, a Corporation,

By (S.) STANLEY W. GOOD,

Its General Agent,

Plaintiff Above Named.

By THOMPSON, CATHCART & BEEBE,

2–13 Campbell Block, Honolulu,

Attorneys for Plaintiff Above Named.

(S.) E. H. BEEBE. [13]

Territory of Hawaii,

City and County of Honolulu,—ss.

Stanley W. Good, being first duly sworn on oath, deposes and says:

That he is General Agent at Honolulu of the Dollar Steamship Line, a corporation, and as such General Agent is authorized to make this verification for and on behalf of said Dollar Steamship Line, a corporation; that he has read the foregoing complaint, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

(S.) STANLEY W. GOOD,

Subscribed and sworn to before me this 29th day of July, 1926.

[Seal] (S.) RITCHIE G. ROSA,

Notary Public, First Judicial Circuit, Territory of Hawaii. [14]

[Title of Court and Cause.]

SUMMONS.

Action brought in Said District Court, and the Complaint Filed in the Office of the Clerk of Said District Court in Honolulu.

The President of the United States of America, GREETING: To Jeanette A. Hyde, United States Collector of Customs, Port of Honolulu, Honolulu, T. H., Defendant:

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the Territory of Hawaii, within twenty days after service.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any *or damages* demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable J. T. DeBOLT, Judge of said District Court, this 29th day of July in the year of our Lord one thousand nine hundred twenty-six and of the independence of the United States the one hundred and fifty-first.

[Seal] (S.) WM. L. ROSA,
Clerk.

By ——————————,
Deputy Clerk. [15]

United States Marshal's Office,
City of Honolulu, Territory of Hawaii.

I hereby certify that I received the within writ on the 29th day of July, A. D. 1926, and personally served the same on the 29th day of July, A. D. 1926, upon Jeannette A. Hyde, United States Collector of Customs, Port of Honolulu, by delivering to and leaving with Jeannette A. Hyde, said defendant named therein, personally, at Honolulu, T. H., a certified copy thereof, together with a copy of the complaint certified to by Wm. L. Rosa, Clerk, attached thereto.

OSCAR P. COX,
U. S. Marshal.
By (S.) O. F. Heine,
Office Deputy.

Marshal's Civil Docket No. 1273. [16]

[Endorsed]: Filed August 17, 1926, at 1 o'clock and 45 minutes P. M.

Copy of the within demurrer is hereby acknowledged this 17th day of August, 1926.

(S.) THOMPSON, CATHCART & BEEBE,
E. H. S.,
Attorneys for Plaintiff. [17]

[Title of Court and Cause.]

DEMURRER.

Comes now Jeanette A. Hyde, United States Collector of Customs at the Port of Honolulu, the defendant above named, and demurs to the complaint herein upon the following grounds, to wit:

I.

That the complaint does not set out sufficient or any facts to constitute a cause of action.

II.

That the complaint does not set out facts sufficient to entitle the plaintiff to the relief prayed for or to any relief.

III.

That it affirmatively appears from the allegations of the complaint that the plaintiff is not entitled to the relief prayed for or to any relief.

WHEREFORE, it is prayed that said complaint be dismissed.

(S.) CHARLES E. CASSIDY,
CHARLES E. CASSIDEY,
Asst. United States Attorney, District of Hawaii,
Attorney for Defendant.

Dated: Honolulu, T. H., August 17, 1926. [18]

I, Charles E. Cassidy, Assistant United States Attorney for the District of Hawaii, attorney for defendant, do hereby certify that the foregoing demurrer is not filed for the purpose of delay and to my opinion is well taken in point of law.

(S.) CHARLES E. CASSIDY. [19]

PROCEEDINGS — ARGUMENT ON DEMURRER TO COMPLAINT — CAUSE SUBMITTED.

From the Minutes of the U. S. District Court, Territory of Hawaii.

Friday, August 27, 1926.

(Title of Court and Cause.)

Personally appeared Mr. Eugene H. Beebe, counsel for the plaintiff, and also came Mr. Charles E. Cassidy, Assistant United States District Attorney, counsel for the defendant, and this case was called for argument. After due hearing the Court ordered that counsel submit briefs. Counsel for the defense was given to and including the 10th of September in which time to file his opening brief; counsel for the plaintiff was given to the 17th day of September to file his answering brief and counsel for the defense was given three days thereafter in which to file his answer. [20]

[Endorsed]: Filed Oct. 4, 1926, at 9 o'clock and 05 minutes A. M. [21]

RULING ON DEMURRER.

This cause comes before the Court on the complaint and demurrer filed herein. The grounds of demur, in effect, are that the complaint does not state a cause of action.

The complaint, in substance, shows that on November 17, 1925, *at* Seiichi Yamate, an alien, holding a permit to re-enter the United States, having resided in Hawaii 18 years, and his residence being unrelinquished, embarked at Yokohama, Japan, as a passenger on the plaintiff's steamship, the "President Lincoln," and on November 26, 1925, arrived at the port of Honolulu, his destination, and was refused permission to re-enter for the reason that he was afflicted with a loathsome and dangerous disease; that upon the exclusion of Yamate, the defendant, as Collector of Customs at the port of Honolulu, imposed against the plaintiff, the Steamship Company, a fine of $1000.00 and the additional sum of $40.00 for the transportation of Yamate from Honolulu to Yokohama; that upon the imposition of the fine the plaintiff, to effect clearance of the vessel in question, paid to the defendant as such Collector, under protest, the sum of $1040.00, the total amount of the fine and passage money, for the recovery of which sum this action was instituted.

In my opinion, upon the facts as alleged in the complaint, not only was the alien passenger, Yamage, rightly excluded, but the Collector of Customs had no alternative [22] other than to impose and require the payment of the fine and passage money assessed against the Steamship Company, the plaintiff herein.

The demurrer, therefore, is sustained and the complaint dismissed.

(S.) J. T. DeBOLT,
Judge.

Oct. 4, 1926. [23]

PROCEEDINGS—ARGUMENT ON MOTION TO STRIKE AND DEMURRER—ORDER SUSTAINING MOTION TO STRIKE AND DEMURRER AND ORDER GRANTING FILING OF AMENDED COMPLAINT.

From the Minutes of the U. S. District Court, Territory of Hawaii.

Friday, December 10, 1926.

[Title of Court and Cause.]

On this day came Mr. Eugene H. Beebe, of the firm of Thompson, Cathcart & Beebe, counsel for the plaintiff, and also came Mr. C. H. Hogg, Assistant United States District Attorney, counsel for the respondent, and this case was called for hearing on a motion to strike and demurrer. Argument was had by respective counsel and at the conclusion thereof the Court granted the motion to strike and sustained the demurrer. Whereupon Mr. Beebe moved for leave to amend the complaint herein in so far as paragraph five was concerned. Said motion was granted by the Court and Mr. Beebe was given five days within which time to file said amendment. The motion to strike was granted

and the demurrer sustained for the reason that the disease was not susceptible of detection at the time of the examination at the port of embarkation. [24]

[Endorsed]: Filed December 13, 1926, at 2 o'clock and 35 minutes A. M. [25]

[Title of Court and Cause.]

SECOND AMENDED COMPLAINT.

Comes now the plaintiff above named and for cause of action against the above-named defendant alleges:

I.

That at all times hereinafter mentioned plaintiff has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, and authorized to do and doing business in the Territory of Hawaii and within the jurisdiction of this Court.

II.

That at all times hereinafter mentioned the defendant, Jeanette A. Hyde, has been and now is the duly appointed, qualified and acting United States Collector of Customs, Port of Honolulu, Territory of Hawaii, a resident of said Honolulu, and within the jurisdiction of this Court.

III.

That at all times hereinafter mentioned the plaintiff has [26] been and now is the owner and operator of various steamships, one of said steam-

ships being the S.S. "President Lincoln" and engaged in the business of carrying mails, passengers and goods, for hire, between various ports of the United States, including the port of Honolulu, Territory of Hawaii, and ports of foreign countries; that at the time of the commission of the illegal act hereinafter complained of, there was subsisting between the plaintiff and the United States of America and various individual shippers valid and binding contract for the carriage, for hire, of mails and various commodities, between the ports of the United States of America and ports of foreign countries, and return.

IV.

That on or about the 17th day of November, A. D. 1925, at Yokohama, Japan, one Seiichi Yamate, an alien holding a permit to re-enter the United States of America, said alien being a resident of and having been domiciled in the Territory of Hawaii for a continuous period of eighteen years, said residence and domicile having been unrelinquished and said alien being desirous of returning thereto after a temporary absence abroad of approximately three months, became a passenger for hire aboard the S.S. "President Lincoln," said vessel being bound for the port of San Francisco, California, via the port of Honolulu, the destination of Seiichi Yamate being Honolulu, Territory of Hawaii.

V.

That prior to his embarkation upon said vessel at the [27] port aforesaid, said Seiichi Yamate was examined for contagious and/or loathsome and/

or other diseases by the medical authorities of the Empire of Japan, and was certified by such authorities as being free therefrom; that said Seiichi Yamate, prior to the sailing of said vessel, was again examined by the United States Public Health Service at Yokohama, Japan, for contagious and/or loathsome and/or other diseases, and was permitted by said Service to board said vessel as a person free from disease; that prior to the sailing of said vessel from the port aforesaid, said alien was again examined by the surgeon of said vessel, said surgeon being a competent physician and surgeon duly qualified and licensed to practice as such in the State of California and elsewhere, for contagious and/or loathsome and/or other diseases, and found to be without evidence thereof; that upon four occasions subsequent to the sailing of said vessel at the port of Honolulu, said Seiichi Yamate was examined by said surgeon for disease as aforesaid, none of said examinations revealing any symptoms of any contagious,loathsome or other disease; that said examinations were made by competent medical authorities, were made for the purpose of discovering whether or not said Seiichi Yamate was suffering from or afflicted with any contagious and/or loathsome and/or other disease; that if, at the time of said examinations said Seiichi Yamate was suffering from any such disease, the same had not progressed to such a stage that it was susceptible of discovery by competent medical examination. [28]

VI.

That subsequent to the 26th day of November, 1925, said date being the date of arrival of said vessel at said port of Honolulu, said alien was refused admission to the United States of America for the alleged reason that said alien was afflicted with a loathsome and/or contagious disease, to wit, leprosy.

VII.

That thereupon and notwithstanding the examinations aforesaid, it appeared to the satisfaction of the Secretary of Labor that said alien so brought to the United States as aforesaid, was afflicted with said disease at the time of foreign embarkation as aforesaid, and thereupon said Secretary determined that said disease might have been detected by means of a competent medical examination at said port of embarkation.

VIII.

That immediately upon such determination by said Secretary as aforesaid, said defendant, Jeanette A. Hyde, Collector of Customs, as aforesaid, purporting to act under the provisions of Section 9 of the "Immigration Act of 1917" as amended by Section 26 of the "Immigration Act of 1924," and despite the fact that said alien was returning from a temporary absence abroad to an unrelinquished United States domicile in excess of seven consecutive years, and despite the proviso to said Section 9 of said "Immigration Act of 1917 as amended by Section 26 of the Immigration Act of 1924," reading:

> "That nothing contained in this section shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions [29] to Section 3 of this Act exempted from the excluding provisions of said section,"

and the proviso to said Section 3 of the "Immigration Act of 1917," reading:

> "That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe."

imposed against said defendant a fine of One Thousand Dollars ($1000.00) and in addition a sum equal to that paid by said alien for his transportation from the initial point of departure, indicated in his ticket, to the port of Honolulu, to wit, Forty Dollars ($40.00) or a total of One Thousand Forty Dollars ($1040.00).

IX.

That upon the imposition of said fine and for the purpose of effecting collection of the same, said defendant threatened to refuse clearance papers to said S.S. "President Lincoln," and thereupon to effect the clearance of said vessel and to prevent inconvenience to the passengers aboard said vessel, and a breach of its mail and merchandise contracts, plaintiff paid to said defendant as Collector as aforesaid, under duress and protest, said fine of

One Thousand Forty Dollars ($1040.00) so illegally imposed and collected as aforesaid; that although demand has been made upon said defendant for the return of said sum of One Thousand Forty Dollars ($1040.00) said defendant has wholly failed, refused and neglected to repay the same or any part thereof to the plaintiff. [30]

WHEREFORE, plaintiff prays judgment against defendant in the sum of One Thousand Forty Dollars ($1040.00), together with interest at the legal rate from the date of payment together with its costs and disbursements herein expended.

Dated at Honolulu, T. H., this 13th day of December, A. D. 1926.

DOLLAR STEAMSHIP LINE, a Corporation,

By (S.) S. W. GOOD,
Its General Agent,
Plaintiff Above Named.

THOMPSON, CATHCART & BEEBE,
2–13 Campbell Block, Honolulu, T. H.,
Attorneys for Plaintiff.
Per (S.) E. H. BEEBE. [31]

Territory of Hawaii,
City ond County of Honolulu,—ss.

Stanley W. Good, being first duly sworn on oath, deposes and says: That he is General Agent at Honolulu of the Dollar Steamship Line, a corporation, and as such General Agent is authorized to make this verification for and on behalf of said Dollar Steamship Line, a corporation; that he has

read the foregoing second amended complaint, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

(S.) S. W. GOOD.

Subscribed and sworn to before me this 13th day of December, A. D. 1926.

[Seal] (S.) RITCHIE G. ROSA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Due service by copy of the within second amended complaint is hereby admitted.

(S.) CHARLES H. HOGG,
Attorney for Defendant.

Honolulu, Hawaii, December 13, 1926. [32]

[Endorsed]: Filed December 23, 1926, at 3 o'clock and —— minutes P. M.

Copy of the within demurrer is hereby acknowledged this 23d day of December, 1926.

(S.) THOMPSON, CATHCART & BEEBE,
E. H. B.,
Attorneys for Plaintiff. [33]

[Title of Court and Cause.]

DEMURRER TO SECOND AMENDED COMPLAINT.

Comes now Jeannette A. Hyde, United States Collector of Customs at the Port of Honolulu, the defendant above named, and demurs to the second

amended complaint herein upon the following grounds, to wit:

I.

That the said second amended complaint does not state facts sufficient to constitute a cause of action.

II.

That said second amended complaint does not set out any facts which entitle the plaintiff to recover against the defendant.

III.

That the said second amended complaint does not set out facts sufficient to entitle the plaintiff to the relief prayed for in said second amended complaint or to any relief whatever.

WHEREFORE, the defendant prays that the said second amended complaint be dismissed.

Dated: Honolulu, Hawaii, December 23, 1926.

(S.) CHARLES H. HOGG.

CHARLES H. HOGG,

Asst. United States Attorney, District of Hawaii, Attorney for Defendant. [34]

I, Charles H. Hogg, Assistant United States Attorney for the District of Hawaii, attorney for defendant, do hereby certify that the foregoing demurrer is not filed for the purpose of delay and to my opinion is well taken in point of law.

(Sgd.) CHARLES H. HOGG. [35]

PROCEEDINGS—ARGUMENT ON SECOND AMENDED COMPLAINT—ORDER SUSTAINING SAID DEMURRER TO SECOND AMENDED COMPLAINT.

From the Minutes of the U. S. District Court, Territory of Hawaii.

Friday, January 21, 1927.

(Title of Court and Cause.)

On this day came Mr. E. H. Beebe, of the firm of Thompson, Cathcart & Beebe, counsel for plaintiff herein, and also came Mr. C. H. Hogg, Assistant United States District Attorney, counsel for the respondent, and this case was called for hearing on a demurrer to the second amended complaint. Thereupon and after due argument by respective counsel, the demurrer was sustained by the Court. An exception was entered by Mr. Beebe, who also gave notice of appeal. [36]

[Endorsed]: Filed January 22, 1927, at 11 o'clock and 25 minutes A. M. [37]

RULING ON DEMURRER TO SECOND AMENDED COMPLAINT.

This cause again comes before the Court on the second amended complaint and the demurrer thereto filed herein. The grounds of demur, in effect, are that the complaint does not state a cause of action.

The complaint, in substance, shows that on No-

vember 17, 1925, Seiichi Yamate, an alien, holding a permit to re-enter the United States, having resided in Hawaii 18 years and his residence being unrelinquished, embarked at Yokohama, Japan, as a passenger on the plaintiff's steamship, the "President Lincoln," and on November 26, 1925, about ten days after embarkation, arrived at the Port of Honolulu, his destination, and was refused permission to re-enter for the reason that he was afflicted with a loathsome and dangerous disease, to wit, leprosy; that, nowithstanding the failure to discover that Yamate was afflicted with leprosy upon a medical examination of him made on behalf of the Steamship Company before he embarked, "it appeared to the satisfaction of the Secretary of Labor that said alien so brought to the United States as aforesaid, was afflicted with said disease at the time of foreign embarkation as aforesaid, and thereupon said Secretary of Labor determined that said disease might have been detected by means of a competent medical examination at said port of embarkation." (Paragraph VII, second amended complaint.)

That upon the exclusion of Yamate, the defendant, as Collector of Customs at the port of Honolulu, imposed against the plaintiff, the Steamship Company, a fine of $1000.00 and the [38] additional sum of $40.00 for the transportation of Yamate from Honolulu to Yokohama; that upon the imposition of the fine the plaintiff, to effect clearance of the vessel in question, paid the defendant as such Collector, under protest, the sum of $1,040.00, the total amount of the fine and passage money, for the recovery of which sum, this action was instituted.

Under the provisions of Section 26 of the Immigration Act of 1924, Section 9 of the Immigration Act of 1917 is amended to read, so far as is material in this action, as follows:

> "Sec. 9. That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of [39] $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket to the port of arrival for each and

every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. . . . *Provided further,* That nothing contained in this section shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions to section 3 of this act exempted from the excluding provisions of said section."

It is contended on behalf of the Steamship Company that, according to the terms of the proviso just quoted, the alien in question was and is exempt. I cannot accept this view. Under the provisions of the above-quoted section it is made unlawful to bring to the United States "any alien afflicted with . . . a loathsome or dangerous contagious disease." This language correctly describes the alien in question. Moreover, the Secretary of Labor, with regard to the alien in question, having "determined that said disease might have been detected by means of a competent medical examination at said port of embarkation," was and is final and conclusive. The Court cannot go behind that finding.

The demurrer, therefore, is sustained and the complaint is dismissed.

(S.) J. T. DeBOLT,
Judge.

January 22, 1927. [40]

PROCEEDINGS — DECISION SUSTAINING DEMURRER TO SECOND AMENDED COMPLAINT AND EXCEPTIONS THERETO.

From the Minutes of the U. S. District Court, Territory of Hawaii.

Monday, February 21, 1927.

(Title of Court and Cause.)

On this day came Eugene H. Beebe, of the firm of Thompson, Cathcart & Beebe, counsel for the plaintiff, and also came Mr. C. H. Hogg, Assistant United States District Attorney, counsel for the respondent, and this case was called for decision on the demurrer to the second amended complaint. The Court sustained the demurrer to which decision Mr. Beebe entered an exception, said exception being granted by the Court. [41]

[Endorsed]: Filed February 21, 1927, at 10 o'clock and 40 mnutes A. M. [42]

[Title of Court and Cause.]

ELECTION OF PLAINTIFF TO STAND ON PLEADINGS.

Comes now the plaintiff in the above-entitled action, by Thompson, Cathcart & Beebe, its attorneys, and deciding not to amend its second amend complaint in the above-entitled action, stands on the pleadings.

Dated, Honolulu, T. H., February 21, 1927.

DOLLAR STEAMSHIP LINE, a Corporation,

Plaintiff Above Named.

By THOMPSON, CATHCART & BEEBE,

(S.) F. E. THOMPSON,

(S.) E. H. BEEBE,

Its Attorneys. [43]

[Endorsed]: Filed February 21, 1927, at 2 o'clock and 25 minutes A. M.

Copy of the within Decree received this 21 day of February, 1927.

(S.) THOMPSON, CATHCART & BEEBE,

E. H. B.,

Attorneys for Plaintiff. [44]

In the United States District Court for the Territory of Hawaii.

Civil No. 170.

DOLLAR STEAMSHIP LINE,

Plaintiff,

vs.

JEANNETTE A. HYDE, United States Collector of Customs, Port of Honolulu,

Defendant.

DECREE.

This cause having come on regularly before the Honorable J. T. DeBolt, a Judge of this Court, to be heard upon the second amended complaint and

the demurrer thereto filed herein, and was argued by counsel, and submitted to the Court for its consideration and decision; and the Court being fully advised in the premises, sustained the defendant's demurrer to the plaintiff's second amended complaint, as shown by the decision rendered and filed herein on this 22d day of January, 1927; and the plaintiff having, in writing filed herein, elected not to further amend its complaint herein or to plead further, but to stand on its second amended complaint as filed herein, the Court finds that the second amended complaint does not state a cause of action against the defendant: [45]

NOW, THEREFORE, upon motion of Charles H. Hogg, Assistant United States Attorney, attorney for the defendant, it is hereby ORDERED, ADJUDGED AND DECREED that the defendant's demurrer to the plaintiff's second amended complaint filed herein be sustained, and that the cause be and hereby is dismissed and that the defendant recover from the plaintiff all costs of this action which are hereby taxed in the sum of $15.00.

Dated: Honolulu, T. H., February 21, 1927.

(S.) J. T. DeBOLT,

Judge, United States District Court, Territory of Hawaii.

Plaintiff excepts to the entry of the foregoing Decree, which exception the Court hereby allows this 21st day of February, 1927.

(S.) J. T. DeBOLT,

Judge, United States District Court, Territory of Hawaii. [46]

[Endorsed]: February 28/27, at 9 o'clock and 05 minutes A. M. [47]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR AND ALLOWANCE.

Comes now Dollar Steamship Line, a corporation, plaintiff above named, by Thompson, Cathcart & Beebe, its attorneys, and feeling itself aggrieved by the decision and judgment sustaining the demurrer to its second amended complaint herein and denying its claim, and complaining that there is manifest error to the damage of the plaintiff in the same, as will more in detail appear from the assignment of errors which is filed with this petition prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, for the correction of the error so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals, and also [48] that an order be made fixing the amount of the security which the petitioner shall give and furnish upon the said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit; and your petitioner will ever pray.

Dated, Honolulu, T. H., February 28, 1927.

DOLLAR STEAMSHIP LINE, a Corporation,

Plaintiff Above Named.

By THOMPSON, CATHCART & BEEBE,

(S.) F. E. THOMPSON,

(S.) E. H. BEEBE,

Its Attorneys.

Allowed, and the amount of the bond is hereby fixed at Five Hundred Dollars ($500.00).

(S.) J. T. DeBOLT,

Judge of the United States District Court for the Territory of Hawaii. [49]

[Endorsed]: Filed Feby. 28/27, at 9 o'clock and 05 minutes A. M. [50]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the above-named plaintiff, Dollar Steamship Line, a corporation, and says that in the records and proceedings in the above-entitled cause, there is manifest error in this, to wit:

I.

That the Court erred in sustaining the demurrer of the defendant to the second amended complaint of the plaintiff and in ordering judgment for the defendant.

II.

That the Court erred in entering judgment for the defendant and against the plaintiff.

III.

That the Court erred in holding and determining that the plaintiff, Dollar Steamship Line, was subject to the fine or penalty provided for by section 26 of the "Immigration Act of 1924," for bringing to the United States an alien returning after a temporary absence to an unrelinquished United [51] States domicile of seven (7) consecutive years, (Seventh proviso, Sec. 3, Immigration Act 1917), though it appears to the Secretary of Labor that such alien was suffering from a dangerous and/or contagious disease at the time of embarkation, and that the existence of such disease may have been discovered by competent medical examination at the point of foreign embarkation.

IV.

That the Court erred in holding that under the facts set forth in plaintiff's second amended complaint, it could not go behind the finding of the Secretary of Labor that plaintiff was liable to fine.

V.

That the Court erred in holding and determining that plaintiff take nothing by the cause of action set forth in its second amended complaint herein.

WHEREFORE, plaintiff prays that said judgment be reversed.

Dated, Honolulu, T. H., February 28, 1927.

DOLLAR STEAMSHIP LINE, a Corporation,

Plaintiff Above Named.

By THOMPSON, CATHCART & BEEBE,

(S.) F. E. THOMPSON,

(S.) E. H. BEEBE,

Its Attorneys. [52]

[Endorsed]: Filed Feby. 28/27, at 9 o'clock and —— minutes A. M. [53]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,—ss.

President of the United States of America, to the Honorable JOHN T. DeBOLT and the Honorable WILLIAM T. RAWLINS, Judges of the United States District Court for the Territory of Hawaii, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment on the plea which is in said District Court before you in the case of Dollar Steamship Line, a Corporation, Plaintiff, vs. Jeannette A. Hyde, United States Collector of Customs, Port of Honolulu, Defendant, manifest error has happened to the great damage of said plaintiff as is said and appears by the petition herein;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy jus-

tice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit [54] Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said court thirty (30) days after this date, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States this 28th day of February, A. D. 1927.

ATTEST my hand and seal of the United States District Court in and for the Territory of Hawaii, in the Clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal] WM. L. ROSA,
Clerk of the United States District Court for the Territory of Hawaii.

Allowed this 28th day of February, A. D. 1927.

J. T. DeBOLT,
Judge of the United States District Court for the Territory of Hawaii. [55]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to JEANNETTE A. HYDE, United States Collector of Customs at the Port of Honolulu, and to the Honorable SANFORD BALLARD DOLE WOOD, United States District Attorney for the *District of the* Territory of Hawaii, Her Attorney, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the United States District Court for the Territory of Hawaii, wherein Dollar Steamship Line, a corporation, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be [57] corrected and speedy justice not be done to the parties in that behalf.

WITNESS the Honorable J. T. DeBOLT, Judge of the United States District Court for the Territory of Hawaii, this 28th day of February, A. D. 1927.

J. T. DeBOLT,

Judge of the United States District Court for the Territory of Hawaii.

Service on behalf of the defendant herein is hereby accepted.

SANFORD B. D. WOOD,
United States Attorney for the Territory of Hawaii,
Attorney for the Defendant. [58]

[Endorsed]: Filed Feby. 28, 1927, at 9 o'clock and 50 minutes A. M. [59]

[Title of Court and Cause.]

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That Dollar Steamship Line, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto Jeannette A. Hyde, United States Collector of Customs for the port of Honolulu, defendant above named, in the penal sum of Five Hundred Dollars ($500.00) for the payment of which well and truly to be made we bind ourselves and our respective successors, executors, administrators and assigns by these presents.

The condition of this obligation is such that,—

WHEREAS, on the 28 day of February, 1927, the above-bounden principal sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment made and entered in the above-entitled court and cause on the 21st day of February, 1927,

by the Honorable J. T. DeBOLT, Judge of said court,— [60]

NOW, THEREFORE, if said principal shall prosecute said writ to effect, and answer all damages and costs if it fail to sustain said writ of error, then this obligation to be void; otherwise it shall remain in full force and effect.

WITNESS the hands of the above bounden this 28th day of February, 1927.

DOLLAR STEAMSHIP LINE, a Corporation,

Principal.

By (S.) S. W. GOOD,

Its General Agent.

UNITED STATES FIDELITY & GUARANTY COMPANY,

By (S.) HERMAN LUIS,

Its Attorney-in-fact.

Surety.

The foregoing bond is approved.

(S.) J. T. DeBOLT,

Judge of the United States District Court for the Territory of Hawaii. [61]

[Endorsed]: Filed March 1, 1927, at 3 o'clock and 15 minutes P. M.

Due service by copy of the within praecipe is hereby admitted.

(S.) SANFORD B. D. WOOD,

Attorney for Deft.

Honolulu, Hawaii, March 1, 1927. [62]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To William L. Rosa, Esquire, Clerk of the United States District Court for the Territory of Hawaii:

Pursuant to the writ of error issued in the above-entitled cause, you are hereby directed to transmit to the United States Circuit Court of Appeals for the Ninth Circuit, the record, duly certified, in the above-entitled cause, including the documents hereinafter referred to:

1. Plaintiff's original complaint herein, dated July 29, 1926.

2. Demurrer of the defendant, dated August 17, 1926, to said complaint.

3. Ruling of the Honorable J. T. DeBolt, dated October 4, 1926, on demurrer.

4. Plaintiff's second amended complaint, dated December 13, 1926.

5. Demurrer of defendant, dated December 23, 1926, to second amended complaint.

6. Ruling of the Honorable J. T. DeBolt, dated January 22, 1927, on demurrer to second amended complaint.

7. Election of plaintiff to stand on pleadings, dated February 21, 1927. [63]

8. Judgment or decree dated February 21, 1927, and exception.

9. Petition for writ of error and order allowing the same, filed February 28, 1927.

10. Assignment of errors, filed February 28, 1927.

11. Writ of error, filed February 28, 1927.

12. Citation on writ of error, and acknowledgment of service, filed February 28, 1927.

13. Bond on writ of error, filed February 28, 1927.

14. Praecipe for transcript of record.

15. Clerk's minutes.

16. Certificate.

Dated, Honolulu, T. H., March 1, 1927.

DOLLAR STEAMSHIP LINE, a Corporation,

Plaintiff Above Named.

By THOMPSON, CATHCART & BEEBE,

(S.) F. E. THOMPSON,

(S.) E. H. BEEBE,

Its Attorneys. [64]

In the United States District Court for the Territory of Hawaii.

United States of America,
Territory of Hawaii,—ss.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 65, inclusive, to be a true and complete transcript of the record and proceedings had in said court

in the above-entitled cause, as the same remains of record and on file in my office, and I further certify that I am attaching hereto two original orders enlarging time for docketing case, the original writ of error and citation and that the costs of the foregoing transcript of record is $24.20, and that said amount has been paid to me by the appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 14th day of April, A. D. 1927.

[Seal] WM. L. ROSA,

Clerk, United States District Court, Territory of Hawaii. [65]

[Endorsed]: No. 5129. United States Circuit Court of Appeals for the Ninth Circuit. Dollar Steamship Line, a Corporation, Plaintiff in Error, vs. Jeannette A. Hyde, United States Collector of Customs, Port of Honolulu, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Hawaii.

Filed April 23, 1927.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 5129

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

4

DOLLAR STEAMSHIP LINE, a corporation,
Plaintiff in Error,

vs.

JEANETTE A. HYDE, United States Collector of Customs, Port of Honolulu,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the Territory of Hawaii.

THOMPSON, CATHCART & BEEBE
F. E. Thompson
E. H. Beebe
M. H. Easton.
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Honolulu, T. H.,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DOLLAR STEAMSHIP LINE, a corporation,
Plaintiff in Error,

vs.

JEANETTE A. HYDE, United States Collector of Customs, Port of Honolulu,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

In this action the Dollar Steamship Line sought recovery of a fine of one thousand dollars ($1000.00) imposed upon it by the defendant as Collector of Customs at the port of Honolulu, the amount of the fine and a forty dollar ($40.00) alien transportation charge having been paid under protest and involuntarily.

To the second amended complaint (R. pp. 17-22) a general demurrer was interposed and sustained with an exception reserved (R. p. 29). An election to stand upon the pleadings was thereupon made (R. p. 29) and the court below entered judgment, dismissing the action with costs (R. pp. 30, 31).

The petition for writ of error and assignment of errors was served, filed and allowed a writ of error and citation thereunder issued (R. pp. 32-37).

The facts alleged in the complaint and admitted by demurrer are briefly as follows:

On November 26th, 1925, the plaintiff corporation's steamer "President Lincoln" arrived at the port of Honolulu enroute from Yokohama to San Francisco with one Seiichi Yamate on board as a steerage passenger for hire, he having embarked at Yokohama and being bound for Honolulu. Yamate was an alien holding a permit to re-enter the United States. He had been a resident of the Territory of Hawaii and domiciled therein for eighteen years continuously, the residence and domicile having been unrelinquished, and was returning after a temporary absence abroad of approximately three months.

Upon arrival at the port of Honolulu the alien passenger was landed but after examination refused admittance for the alleged reason that he was afflicted with a loathsome and/or dangerous contagious disease. The defendant, as Collector of Customs, purporting to act under the provisions of Section 9 of the "Immigration Act of 1917" as amended by Section 26 of the "Immigration Act of 1924" and despite the fact that the alien was returning to an unrelinquished United States domicile in excess of seven consecutive years' duration and despite the proviso to Section 9 of said Act, reading:

> "That nothing contained in this section shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions to Section 3 of this Act exempted from the excluding provisions of said section,"

and the proviso to said Section 3, reading:

> "That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe,"

imposed against the transportation company, plaintiff in error herein, a fine of one thousand dollars ($1000.00) and transportation costs amounting to forty dollars ($40.00); and refused to grant clearance papers to the "President Lincoln" until payment thereof had been made. The complaint alleges that the fine was illegally imposed and collected and was paid under duress. (R. pp. 17-21.)

SPECIFICATION OF ERRORS.

I.

That the Court erred in sustaining the demurrer of the defendant to the second amended complaint of the plaintiff and in ordering judgment for the defendant.

II.

That the Court erred in entering judgment for the defendant and against the plaintiff.

III.

That the Court erred in holding and determining that the plaintiff, Dollar Steamship Line, was subject to the fine or penalty provided for by Section 26 of the "Immigration Act of 1924", for bringing to the United States an alien returning after a temporary absence to an unrelinquished United States domicile of seven (7) consecutive years (Seventh proviso, Sec. 3, Immigration Act, 1917), though it appears to the Secretary of

Labor that such alien was suffering from a dangerous and/or contagious disease at the time of embarkation, and that the existence of such disease may have been discovered by competent medical examination at the point of foreign embarkation.

IV.

That the Court erred in holding that under the facts set forth in plaintiff's second amended complaint, it could not go behind the finding of the Secretary of Labor that plaintiff was liable to fine.

V.

That the Court erred in holding and determining that plaintiff take nothing by the cause of action set forth in its second amended complaint herein. (R. pp. 33-34.)

ARGUMENT.

The question involved, that is, whether a carrier is liable to fine under the facts admitted and hereinafter set forth, is of the utmost importance to all carriers by water operating vessels between the United States and foreign ports. It arises by virtue of these admitted facts: The carrier in question returned from a temporary absence abroad, to an unrelinquished United States domicile of eighteen (18) consecutive years, an alien, the Secretary of Labor, upon such return, determining that the alien was afflicted with a dangerous contagious disease which should have been discovered by competent medical examination at the point of foreign embarkation.

The fine in question was assessed by reason of the provisions of Section 9 of the "Immigration Act of 1917", as amended by Section 26 of the "Immigration Act of 1924", such section reading:

> "That it shall be unlawful for any person, including any transportation company, other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of Labor than any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival for each and every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien afflicted with any mental defect other than those above specifically named, or physical defect of a nature which may affect his ability to earn a living, as contemplated in section 3 of this act, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United

States was so afflicted at the time of foreign embarkation, and that the existence of such mental or physical defect might have been detected by means of a competent medical examination at such time, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $250., and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien for whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien who is excluded by the provisions of section 3 of this act because unable to read, or who is excluded by the terms of section 3 of this act as a native of that portion of the Continent of Asia and the islands adjacent thereto described in said section, and if it shall appear to the satisfaction of the Secretary of Labor that these disabilities might have been detected by the exercise of reasonable precaution prior to the departure of such aliens from a foreign port, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien on whose account assessed.

> " 'If a fine is imposed under this section for the bringing of an alien to the United States, and if such alien is accompanied by another alien who is excluded from admission by the last proviso of section 18 of this act, the person liable for such fine shall pay to the collector of customs, in addition to such fine but

as a part thereof, a sum equal to that paid by such accompanying alien for his transportation from his initial point of departure indicated in his ticket to the point of arrival, such sum to be delivered by the collector of customs to the accompanying alien when deported. And no vessel shall be granted clearance papers pending the determination of the question of the liability to the payment of such fines, or while the fines remain unpaid, nor shall such fines be remitted or refunded: Provided, that clearance may be granted prior to the determination of such questions upon the deposit of a sum sufficient to cover such fines or of a bond with sufficient surety to secure the payment thereof, approved by the collector of customs. . . . . .'"

"PROVIDED FURTHER, THAT NOTHING CONTAINED IN THIS SECTION SHALL BE CONSTRUED TO SUBJECT TRANSPORTATION COMPANIES TO A FINE FOR BRINGING TO PORTS OF THE UNITED STATES ALIENS WHO ARE BY ANY OF THE PROVISOS OR EXCEPTIONS TO SECTION 3 OF THIS ACT EXEMPTED FROM THE EXCLUDING PROVISIONS OF SAID SECTION."

(43 Stat. L. 166, Fed. Stat. Ann. 1924 Supp. p. 50, sec. 26.)

The proviso being general, that is, applying to all that precedes it rather than any particular clause or portion thereof, it follows as a matter of common understanding that certain diseased or defective aliens may be brought to the United States without subjecting transportation companies to the fine provided in the body of the section. The class of persons that may be brought the proviso settles by reference to *"aliens who are by any of the provisos or exceptions to Section*

3 of this Act exempted from the excluding provisions of said section."

Section 3 of the "Immigration Act of 1917", to which section we are referred by Section 9 above mentioned, excludes from admission to the United States idiots, imbeciles, feeble-minded persons, professional beggars, vagrants, persons afflicted with a loathsome or dangerous contagious disease, persons mentally or physically defective when the defect may impair the ability to earn a living, those having committed a felony, and persons who believe in or advocate the overthrow by force or violence of the government of the United States or any organized government, and many other classes of the same general character. There are many provisos to Section 3, some of them specifically referring only to the paragraph or paragraphs preceding them, while others, without question, are provisos to the entire section. The seventh proviso to Section 3 reads as follows:

> "PROVIDED FURTHER, THAT ALIENS RETURNING AFTER A TEMPORARY ABSENCE TO AN UNRELINQUISHED UNITED STATES DOMICILE OF SEVEN CONSECUTIVE YEARS, MAY BE ADMITTED IN THE DISCRETION OF THE SECRETARY OF LABOR, AND UNDER SUCH CONDITIONS AS HE MAY PRESCRIBE."
>
> (39 Stat. L. 875, Fed. Stat. Ann. 1918 Supp. pg. 214.)

Aliens coming within the purview of this proviso are not excluded and constitute a class exempted from the excluding provisions.

"Exempt" is defined by Webster as "free or released

from some liability to which others are subject; excepted from the operation or burden of some law; released; free, clear, privileged, etc."

Aliens who are returning to an unrelinquished United States domicile of the proper duration of time are "free or released from some liability to which others are subject, excepted from the operation or burden of some law", and are therefore exempted from the excluding provisions. The alien in question was possessed of a return permit which, under the law—Section 10 sudivision F—as alleged by the complaint, shows that he was returning from a temporary visit abroad and the allegations of the complaint, as admitted by demurrer, clearly place him within the conditions of the proviso.

There is no attempt in the language of the seventh proviso to Section 3 to distinguish in any way between diseased, feeble-minded, illiterate or physically defective aliens, and the only condition imposed is that such aliens must be returning to their former United States domicile to present their case for readmission to the Secretary of Labor if the transportation company is to avoid payment of a fine.

It must be admitted that a blind person would be excluded under the general provisions of Section 3, and that under the provisions of Section 9 the physical defect would be of a nature which would subject the transportation company to a fine for attempting to provide means of entrance for such an alien to the United States,—but under the seventh proviso, if a blind alien were transported by a carrier to a port of the United States on the ground that he was returning to an un-

relinquished domicile, there would certainly be no fine imposed upon the carrier whether or not that alien was able to establish, to the satisfaction of the Secretary of Labor, that he was possessed of sufficient means so that his disability would not make him a charge upon this country.

For the sake of bringing before the Court a specific example, we mention the following case, which will no doubt apply to hundreds in the territory and to hundreds of thousands of others in the United States:

Y. Ahin has lived in the territory for many years. He is one of the so-called "Chinese monied princes". He is now blind or practically so. Under the defendant's theory, if followed to its logical conclusion, should Ahin go to China for a temporary visit, he would be precluded from returning to the United States, his ailment being one which would prevent his earning a living, and the transportation line that brought him would be liable to fine. The conclusion is, of course, ridiculous, for upon proof of his financial condition, the Secretary would, no doubt, admit him under the seventh proviso to Section 3 "as an alien returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years."

And if Ahin, though blind, can return to his domicile and without question be admitted by the Secretary of Labor in the exercise of the discretion granted him under the Act, what provision is there which renders a carrier liable if it return him sick rather than blind? The closest scrutiny of the Act fails to reveal any attempt to discriminate in any manner whatsoever between the various degrees of sickness or disability, and

we submit that there was no intent on the part of Congress to penalize carriers for returning to their unrelinquished United States domicile aliens, even though ill.

Daily we witness the immigration authorities permitting the landing of returning resident aliens suffering from trachoma, a dangerous contagious disease, and their admission to Hawaii subsequent to cure, and we find the rules promulgated by the Department of Labor, authorizing such action (see Rule 16 Rules of July 1, 1925).

When the Department has construed the law to permit the promulgation of such a rule, it can hardly be said that the policy of the law is against the bringing of certain specified aliens who are diseased to our shores. And the Court may consider the construction placed on the law by the Department.

(Vol. II Ency. U. S. Sup. Ct. Rep. p. 138.)

The question in this particular case does not have to do with any one disease or disability, nor is it one of admission or rejection, but is rather the construction of the statute and that construction must proceed irrespective of the particular thing being considered. The Secretary of Labor is vested with untrammelled discretion (that this is true, note the fact that the proviso does not start with the usual "if otherwise admissible") which he may exercise in the case of certain aliens who have been residents or domiciled in the United States for more than seven (7) years. The only possible way in which that discretion may be exercised is by having the alien returned to a United States port

and there allowing him to present his case to the Secretary. This principle has very recently been announced in the case of,—

> *Compagnie Francaise De Navigation A Vaperu v. Elting, Collector of Customs,* Circuit Court of Appeals, Second Circuit, May 9, 1927, No. 287 (Fed. Rep. Adv. Sheets, Vol. 19 (2d) No. 6 at page 773).

In this case the transportation company was fined for bringing to the port of New York an alien of Italian nationality who claimed to be returning from a temporary visit abroad to an unrelinquished American domicile. The fine was paid under protest and the action brought to recover it. The regulations promulgated pursuant to the statute under consideration provided that if the alien resided outside of the United States for more than six months he was presumed to have relinquished his domicile but that that presumption might be rebutted by evidence to the contrary. In this case the alien failed to establish, to the satisfaction of the appropriate officer, that he had not abandoned his domicile, and was ordered deported and the steamship company fined. The contention of the plaintiff was that under the Act the alien was given the privilege of presenting evidence to overcome the presumption and that the evidence could only be presented to an immigration official after the alien had arrived in this country, and hence, he was entitled to come to a port of the United States for such purpose and that the transportation company had the privilege of bringing him without incurring any penalty,

irrespective of whether or not the alien might later be deported. The court said:

> "We think this position is well taken. To hold that the transportation company acts at its peril in bringing an alien who claims to be exempt from the quota would be a practical denial to the alien of the privilege of presenting his evidence. No company would bring him on such terms. To hold that the company must investigate the merits of the alien's claim, and is privileged to bring only such aliens as it thinks ought to be admitted, is to make it, rather than the immigration officials, pass upon the alien's claim, which is not the privilege granted the alien by the regulation. . . . . .
>
> "Diligent inquiry would have disclosed merely the facts which the alien submitted at his hearing, and the sufficiency of those facts had to be passed upon by the immigration officials at such hearing before the alien's admissibility could be ascertained. . . . .
>
> "It can scarcely be supposed that Congress intended to penalize a vessel owner for transporting an alien privileged to come for such purpose. The purpose is not to be imputed, in the absence of plain language, to penalize an act innocent of intentional wrong."
>
> Fed. Rep. Advance Sheets, Vol. 19, 2d., No. 6, at page 774.

The judgment of the lower court in affirming the assessment of the fine was reversed and the cause remanded with directions to enter judgment for the plaintiff.

The cited case is the instant case. Here we have Congress saying in plain English to carriers, "If you bring to our shores certain defective aliens you shall pay a penalty of One Thousand Dollars, but no pen-

alty shall be paid if these defectives come within a certain category."

Congress then says: "Within this category, are certain aliens who have been domiciled here for a continuous period of seven years and are returning. Bring them, that the Secretary may admit or reject them in his discretion."

To hold that the above is not what Congress says is to subvert the English language and to nullify both provisos, for no carrier would return such aliens if admission were a condition precedent to non-liability.

CONCLUSION.

There is no question in this case of the good faith of the carrier. The admitted allegations of the complaint (R. par. V. pp. 18-19) show that the utmost care was employed on its behalf by different examining physicians to assure the particular alien's freedom from disease at the time of foreign embarkation and during the period of travel. We believe this was in excess of the requirements of the statute but it amply demonstrates the innocence of intentional wrong.

The statute under which the fine in question was assessed is highly penal in its nature. Its obvious and natural meaning is as above outlined, and this meaning, we feel, should be confirmed by this Court.

It is, therefore, respectfully contended that the demurrer to the second amended complaint should have

been overruled and such order should be entered herein.

Dated at Honolulu, T. H., this 9th day of September, A. D. 1927.

Respectfully submitted,

THOMPSON, CATHCART & BEEBE,

F. E. Thompson,
E. H. Beebe,
M. H. Easton,

Attorneys for Plaintiff in Error.

No. 5129

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

DOLLAR STEAMSHIP LINE, a Corporation,
Appellant,

vs.

JEANNETTE A. HYDE, United States Collector of Customs, Port of Honolulu,
Appellee.

BRIEF FOR APPELLEE

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No. 5129

IN THE

United States Circuit Court of Appeals

FOR THE

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DOLLAR STEAMSHIP LINE, a Corporation,
Appellant,

vs.

JEANNETTE A. HYDE, United States Collector of Customs, Port of Honolulu,
Appellee.

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This is an appeal from the decree of the District Court of Hawaii sustaining the demurrer to appellant's second amended complaint. The appellant elected in open court not to further amend its complaint, and later filed a written election not to amend its second amended complaint and to stand on the pleadings. (R. pp. 30, 31).

The second amended complaint alleges that on or about the 17th day of November, 1925, at Yokohama, Japan, one Seiichi Yamate, an alien holding a permit to re-enter the United States, being a resident of and

having been domiciled in the Territory of Hawaii for a continuous period of eighteen years, and said residence and domicile having been unrelinquished, and said alien being desirous of returning thereto after a temporary absence abroad of approximately three months, became a passenger for hire aboard the S. S. "President Lincoln," said vessel being bound for the port of San Francisco, California, via the port of Honolulu, and owned and operated by appellant. That on the 26th day of September, 1925, said vessel arrived at the port of Honolulu, the destination of said alien, and he was refused admission to the United States for the reason that he was afflicted with a loathsome and/or contagious disease, to wit, leprosy; that "it appeared to the satisfaction of the Secretary of Labor that said alien, so brought to the United States as aforesaid, was afflicted with said disease at the time of foreign embarkation as aforesaid, and thereupon said secretary determined that said disease might have been detected by means of a competent medical examination at said port of embarkation." (Paragraph VII, second amended complaint) (R. p. 20).

That upon such determination by said Secretary as aforesaid, the defendant, as Collector of Customs at the port of Honolulu, imposed against the plaintiff a fine of $1,000.00 and the additional sum of $40.00 for the transportation of said alien from Yokohama, the initial point of departure to the port of Honolulu; that upon the imposition of the fine the plaintiff, to effect clearance of the vessel in question, paid to said

defendant as Collector as aforesaid under duress and protest, said fine of $1,040, for the recovery of which sum this action was instituted. The grounds of demurrer are that the complaint does not state a cause of action.

ARGUMENT

I

ALL ALIENS AFFLICTED WITH A LOATHSOME OR DANGEROUS CONTAGIOUS DISEASE ARE MANDATORILY AND UNCONDITIONALLY EXCLUDED FROM ADMISSION TO THE UNITED STATES.

Section 3 of the Immigration Act of 1917 provides:

> "That the following classes of aliens shall be excluded from admission into the United States: all * * * persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease * * * ."

II

THE PROHIBITION AGAINST THE ADMISSION OF ALIENS APPLIES TO ALL ALIENS IRRESPECTIVE OF PREVIOUS RESIDENCE OR DOMICILE IN THE UNITED STATES.

The statute law of the United States, prior to the Act of 1903, relating to the exclusion of aliens, outside of contract laborers, was directed solely against alien immigrants and not against alien residents returning after a temporary absence.

> Moffitt v. United States, (C. C. A. 9) 128 Fed. 375;
>
> Lapina v. Williams, 232 U. S., 78, 86.

The act of 1903 brought together in one Act the scattered legislation theretofore enacted in regard to

the immigration of aliens into the United States and deliberately eliminated the word "immigrant" and other equivalent qualifying phrases, and made the prohibition against the admission of aliens to apply to all aliens whose history, conditions and characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile within this country.

Lapina v. Williams, 232 U. S. 78, 91;

Hee Fuk Yuen (C. C. A. 9) 273 Fed. 10, 13.

The Act of 1924 defines the term "Alien" as follows:

"Sec. 28, as used in this Act—

(b) The term 'alien' includes any individual not a native-born or naturalized citizen of the United States, but this definition shall not be held to include Indians of the United States not taxed, nor citizens of the islands under the jurisdiction of the United States."

It is said in *Lapina v. Williams,* supra, on page 92, that "none of the excluded classes (with the possible exception of contract laborers, whose exclusion depends upon somewhat different considerations) would be any less undesirable if previously domiciled in the United States." On page 91 of the same case the Court said:

"Upon a review of the whole matter, we are satisfied that Congress, in the Act of 1903, sufficiently expressed, and the Act of 1907 reiterated the purpose of applying its prohibition against the admission of aliens, * * * to all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective

of any qualification arising out of a previous residence or domicile in this country."

In the case of *Lewis v. Frick*, 233 U. S., 291 at 296, 297, the Court, after approving the decision in *Lapina v. Williams*, supra, held that the fact that an alien had been domiciled for six years or more in this country, he remaining still an alien, did not change his status so as to exempt him from the operation of the Immigration Act; and that if he departed from the country, even for a brief space of time, and on reentering brought into the country a woman for the purpose of prostitution or other immoral purposes, he subjected himself to the operation of the clauses of the Act that relate to the exclusion and deportation of aliens, the same as if he had had no previous residence or domicile in this country.

The construction adopted in *Lapina v. Williams*, supra, and *Lewis v. Frick*, supra, is applicable in the instant case. If Seiichi Yamate had returned to the United States free from the disease of leprosy, he might have reasonably expected to be readmitted, but returning afflicted with leprosy, which brought him within an excluded class, he could not expect to be permitted to reenter.

Hee Fuk Yuen, supra, states the rule, that the fact that an alien acquires a lawful domicile in the United States does not give him a status which entitles him as a matter of right to return after a temporary absence from the country.

III

A PERMIT TO REENTER THE UNITED STATES AUTHORIZED BY THE ACT OF 1924, CONFERS NO RIGHTS OF REENTRY.

Section 10 of the Act of 1924 authorizing the issuance of the permit, in subdivision (f) thereof, limits the effect thereof as follows:

> "A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this Section shall be construed as making such permit the exclusive means of establishing that the alien is so returning."

IV

CONGRESS, LEGISLATING UPON MATTERS WITHIN ITS CONTROL, MAY IMPOSE OBLIGATIONS AND SANCTION THEIR ENFORCEMENT BY MONEY PENALTIES AND GIVE TO EXECUTIVE OFFICERS POWER TO ENFORCE SUCH PENALTIES.

The above rule has been so completely affirmatively settled as to require only reference to some of the decided cases.

Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320, 338-342;

C. B. & Q. Ry. v. United States, 220 U. S., 559, 578;

Selective Draft Cases, 245 U. S., 366, 389;

United States v. New York S. S. Co., 269 U. S. 304, 313;

McDowell v. Heiner, 9 F2, 120.

V

DECISIONS OF EXECUTIVE OFFICERS, ACTING WITHIN POWERS EXPRESSLY CONFERRED BY CONGRESS, AND DUE PROCESS OF LAW, AND ARE CONCLUSIVE AGAINST ANY INQUIRY BY THE COURTS.

In *Fong Quong Hay v. Nagle*, 17 F2, 231, this court said: "* * * the statute law and the plain holding of all the decisions * * * say that the findings of the immigration officers on questions of fact affecting the right of an alien to enter this country are conclusive against any inquiry by the courts, and * * * that there is no lack of due process of law."

> Lim Jew v. United States, (C. C. A. 9) 196 Fed. 736, 740;
>
> Lewis v. Frick, 233 U. S. 273.

In construing Section 9 of the Act of 1903, identical in all parts material with Section 26 of the Act of 1924, in imposing a penalty upon a transportation company for bringing excluded aliens into this country, the court in *Oceanic Navigation Company v. Stranahan*, supra, at page 342, says:

> "In view of the absolute power of Congress over the right to bring aliens into the United States we think it may not be doubted that the act would be beyond all question constitutional if it forbade the introduction of aliens afflicted with contagious diseases, and, as a condition to the right to bring in aliens, imposed upon every vessel bringing them in, as a condition of the right to do so, a penalty for every alien brought to the United States afflicted with the prohibited disease, wholly without reference to when and where the disease originated. It must then follow that the provision contained in the statute is of course

valid, since it only subjects the vessel to the exaction when, as the result of the medical examination for which the statute provides, it appears that the alien immigrant afflicted with the prohibited malady is in such a stage of the disease that it must in the opinion of the medical officer have existed and been susceptible of discovery at the point of embarkation."

United States v. New York S. S. Co., supra.

Section 9 of the Immigration Act of 1917 as amended by Section 26 of the Act of 1924, reads as follows:

"That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival for each and every violation of the

provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed."

VI

THE SEVENTH PROVISO TO SECTION 3 OF THE ACT OF 1917 DOES NOT EXEMPT FROM THE EXCLUDING PROVISIONS OF THAT SECTION RETURNING ALIENS WHOSE HISTORY, CONDITION OR CHARACTERISTICS BRING THEM WITHIN THOSE PROVISIONS EXCLUDING ALIENS FROM THIS COUNTRY.

Section 15 of the Act of 1917 provides that proper immigration officials shall board all incoming vessels and there inspect all aliens brought in or order a temporary removal of such aliens for an examination for the purpose of determining the aliens' eligibility to enter the United States. Such a temporary removal shall not be considered a landing. Section 16 provides that a mental and physical examination of all arriving aliens shall be made by medical officers of the United States Public Health Service, who shall certify for the information of the immigration officers and the boards of special inquiry any and all physical and mental defects or diseases observed by said medical officers in any such aliens. This section further provides for an inspection, other than the physical and mental examination, by immigrant inspectors, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States and every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In event of rejection by the board, in all cases where

an appeal to the Secretary of Labor is permitted, the alien shall be so informed and shall have the right to be represented by counsel or other advisor on such appeal. Section 17 provides that in every case where an alien is excluded by the board of special inquiry the decision shall be final unless reversed on appeal to the Secretary of Labor: "Provided, that the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and, except as provided in Section Twenty-one hereof, shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease * * * ." Section 21 provides that any alien liable to be excluded * * * because of physical disability other than tuberculosis or a loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Secretary of Labor upon giving a suitable and proper bond holding the United States, states and territories, etc., harmless against such alien becoming a public charge. Section 18 provides that no alien certified, as provided in Section 16, to be suffering from tuberculosis or from a loathsome or dangerous contagious disease, other than one of quarantinable nature, shall be permitted to land for medical treatment thereof in any hospital in the United States, unless the Secretary of Labor is satisfied that to refuse treatment would be inhumane or cause unusual hardship or suffering, in which case the alien shall be treated in the hospital under the supervision of the immigration officials at the expense of the vessel transporting him.

The purpose of the enactment of those provisions excluding aliens afflicted with a loathsome or dangerous contagious disease, and providing for the imposition of a penalty on vessels bringing to this country aliens so afflicted was and is to guard against the dangers arising from the wrongful taking on board of aliens so afflicted, not only to other passengers of the vessel, but ultimately to the people of the United States, a danger arising from the possible admission of aliens who might have contracted the disease during the voyage, and yet be entitled to admission because apparently not afflicted with the prohibited disease, owing to the fact that time had not elapsed for the manifestation of its presence.

From those provisions and the decisions it is plainly evident that the intention and purpose of Congress in so enacting was to positively and permanently exclude all aliens so afflicted.

The immigration statutes are replete with exceptions and provisos permitting members of many excluded classes to land under conditions stated or at the discretion of the Secretary of Labor, but nowhere is there a proviso or exception favoring the admission of one afflicted with a loathsome or dangerous contagious disease, nor is there discretionary power given the Secretary of Labor to permit the landing of an alien so afflicted save for medical treatment and then only when refusal would be inhumany or cause unusual hardship or suffering.

It is the contention of appellant that the proviso at the end of Section 9 of the Act of 1917 (Section 26

of the Act of 1924) and the Seventh Proviso of Section 3 of the Act of 1917 entitle the alien to land and relieve the transportation company from the penalty imposed.

The Seventh Proviso to Section 3 is as follows:

> "That aliens returning from a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe."

Section 3 positively, mandatorily and unconditionally excludes aliens afflicted with a loathsome or dangerous contagious disease, and while the immigration laws in many cases loosen the bonds of exclusion and grant wide discretionary powers to the Secretary of Labor to admit members of excluded classes in cases where he may deem it wise and humane to do so and under such conditions as he may determine. But nowhere is there an exception or a proviso favoring an alien afflicted as is the alien in this case. In those cases wherein an exception is permitted, and discretion is given the Secretary of Labor relative to admitting aliens of excluded classes, those afflicted with a loathsome or dangerous contagious disease are uniformly excepted from those favored by such exceptions. The Seventh Proviso does not entitle an alien returning to an unrelinquished domicile as a matter of right to enter the United States. His entry depends wholly upon the discretion of the Secretary of Labor. An entry under that proviso can be only a conditional one and under such conditions as the Secretary may prescribe. The rule relative to return-

ing aliens stated in *Lapina v. Williams*, supra, and in *Lewis v. Frick*, supra, that Congress intended the prohibition against the admission of aliens to apply to all aliens whose history, condition or characteristics brought them within the descriptive clauses irrespective of any qualification arising out of a previous residence or domicile in this country, is clearly applicable. Had the alien in this case returned to this country well, mentally and physically, and not tainted or afflicted with a disease or condition mandatorily excluding him, and with nothing against him but his alienage, he might have reasonably expected the Secretary of Labor to admit him. But as he returned afflicted with a disease positively and unconditionally excluding any alien from admission as did the alien in the case of *Lewis v. Frick*, supra, the mere fact that he had, before going away, acquired a residence or domicile in this country he could not have anticipated admission.

VII

A TRANSPORTATION COMPANY BRINGING IN AN ALIEN OF AN EXCLUDED CLASS IS SUBJECT TO THE PENALTY PROVIDED IRRESPECTIVE OF THE ALIEN HAVING PREVIOUSLY ACQUIRED A DOMICILE WITHIN THIS COUNTRY.

Section 9 of the Immigration Act of 1917 as amended by Section 26 of the Act of 1924 provides:

> "Sec. 9. That it shall be unlawful for any person, including a transportation company, * * * or the owner, master, agent or consignee of any vessel to bring to the United States from a foreign country * * * any alien afflicted with * * * tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it

> shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival for each and every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed."

This section conclusively determines the liability of the appellant unless relief is had through the proviso added to the end of that section, which is as follows:

> "Provided further, that nothing contained in this Section shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions to Section Three hereof exempted from the excluding provisions of said section."

The appellant seems to contend that this proviso relieves him from the penalty provided in that section and this contention seems to be predicated upon the further contention that the Seventh Proviso to Section 3 relieves the returning alien from the exclusion provisions of that section.

Section 3 positively, mandatorily and unconditionally

ally excludes aliens afflicted with a loathsome or dangerous contagious disease and every reference to the provision is convincing that there has been no intention on the part of Congress to permit such aliens to land within the United States. The proviso can limit the section only to the extent that its plain wording determines. It says aliens returning to an unrelinquished domicile may be admitted in the discretion of the Secretary of Labor and under such conditions as he may prescribe. There is no positive statement in the proviso that such returning alien shall be permitted to land, while Section 3 states positively that he is unconditionally excluded.

Had it been the intention of Congress to give returning aliens an unconditional right to land, Congress might have so enacted.

The court said, in *Oceanic Navigation Co. v. Stranahan*, supra, page 333, that resort may be had to Senate reports to dispel ambiguity, if it be conceded. But ambiguity is not conceded. Senate Report No. 352, 64th Congress, 1st Session, accompanying H. R. 10384, which later became the Immigration Act of 1917, says:

> "The proviso conferring discretion upon the Secretary of Labor to readmit aliens who had gone abroad temporarily after declaring their intention to become citizens had been extended to include aliens not declarants who, after residing for several consecutive years go abroad temporarily, the purpose undoubtedly being the same the Senate had in view when it incorporated in H. R. 6060 a similar provision (see Senate Report 355, 63d Cong. 2nd Session) which was

> dropped in conference to wit, as a 'humane' provision to permit the readmission to the United States (under proper safeguards) of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in a peculiar or unusual hardship."

That portion of Senate Report No. 355 above referred to is as follows:

> "As the term 'alien' has been defined in Section 1 of the Act (Act of 1917) and construed with reference to the Acts of 1903 by the Supreme Court (Lapina v. Williams, 232 U. S., 78), it seems only humane to invest the Secretary of Labor with authority to permit the readmission to the United States of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in peculiar or unusual hardship."

It is very evident from these reports that Congress understood that the excluding provisions of Section 3 included all aliens, those seeking readmission as well as those seeking admission. Had the understanding been different there was no need for the proviso. And the reports show that the intention in investing the Secretary of Labor with discretionary authority contained in the proviso was to enable him to "permit the readmission to the United States of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in a peculiar or unusual hardship," and reference was made to the construction by the court in *Lapina v. Williams,* supra.

Senate Report No. 352, supra, in reference to Section 9 of the Act of 1917, stated:

"This Section 9 of the existing law with the amount of the fine therein prescribed changed from $100 to $200 and with the addition of provisos for the imposition of a $25 fine for the bringing of a defective alien to United States ports, and a fine of $100 for bringing aliens not able to pass the illiteracy test, or who cannot become eligible to be naturalized, the method of regulation approved by the Supreme Court in *Oceanic Navigation Co. v. United States,* 214 U. S., 320, being availed of throughout the section. The palpable object of these provisions is to prevent hardships and other evils which arise from transportation companies selling tickets to aliens who cannot enter the United States. In addition to the foregoing, which were in H. R. 6060 when passed, the House Committee has added provisions which shall compel transportation companies which bring to the United States aliens who are of certain inadmissible classes to refund to such aliens the cost of their passage (see H. Rept. No. 95, 64th Cong., 1st Sess. pp. 6-7 and has included in the ground of the second $200 fine for the bringing of Hindus."

The same Senate Report relative to the proviso added to Section 9, we find:

"And at the Committee's suggestion there was also added on the floor of the House, Vol. 53, Cong. Record, page 5957 (should be page 5025) a proviso, the purpose of which is to make certain that the penalties prescribed by the section will not operate to prevent steamship companies from selling tickets to aliens entitled to enter under the exemptions specified in Section 3."

Immediately after the introduction of the amendment, Mr. Burnett, Chairman of the House Committee on Immigration, being asked if he desired recognition on the amendment replied:

> "I do not care to discuss it. I think its purpose is obvious. Some members of the committee expressed a doubt as to whether aliens who are fleeing from religious persecution would be permitted by the steamship companies to take passage on their vessels, even if they were admissible to this country. The committee were of the opinion that if they were admissible aliens there could not be any such thing as a penalty on the steamship company, but in order to leave no doubt about that matter the gentleman from New York (Mr. Siegel) offered an amendment, which the committee accepted, and this is that amendment. It is offered in order that there may be no doubt about it." (Vol. 53, Cong. Record page 5025).

It is clearly apparent that it was intended to absolve the transportation companies from liability for bringing in an alien only when the alien was entitled to admission into the country. There is nothing to intimate that there was any intention to absolve them when the alien was not admissible. It is clear that the intention of the statute was to make mandatory the duty of the transportation companies bringing aliens to this country to see to it that the aliens brought in by them were not afflicted with a loathsome or dangerous contagious disease. Congress has power to prohibit the bringing of aliens to this country and to impose any conditions to their admission, and vessels engaged in bringing aliens to this country must be held to undertake to do so on the conditions thus created, and to see that aliens carried by them to the United States are not members of any of the excluded classes. To allow aliens afflicted with the prohibited diseases to be returned to this country would defeat the purpose of the Act.

In *Oceanic Navigation Co. v. Stranahan*, supra, pp. 333-334, the court quoted from report of the Senate Committee on Immigration, (relative Act of 1903) as follows:

> "Notwithstanding the explicit prohibition of the present law, it has been found impossible to prevent the steamship companies from bringing diseased aliens to our ports. Once on this side, every argument and influence that can be used is resorted to, either to effect the landing of such aliens or their treatment in the hospital as a preliminary to such landing. Expert medical testimony is secured to attack the diagnosis of the examining surgeon and even to question the contagious nature of the disease. Pitiable stories are told of the separation of parents from young children to induce officers to relax in the discharge of their plain duty. Great charitable organizations intervene, and even political influence is invoked for the same purpose, the steamship companies themselves, either covertly or openly, displaying a spirit of resistence to the law. If all of these obstacles to the execution of the law fail of their purpose, and the alien afflicted with tuberculosis, favus, or trachoma is sent back, still by the willful or indifferent defiance of this sanitary law the design sought by its passage is defeated, for hundreds may possibly have been indeed, almost certainly have been—exposed to the disease in the steerage on the way over, may have been affected by it and landed before it has reached a stage of development sufficiently advanced to be detected by the medical inspector.
>
> "Section 10 of the measure under consideration (which in the final enactment became paragraph 9 of the law) therefore imposes a penalty of $100, to be imposed by the Secretary of the Treasury (now Secretary of Commerce and Labor), for each case brought to an American port, provided in his judgment the disease might have been detected by

means of medical examination at the port of embarkation. This sufficiently guards the transportation lines from an unjust and hasty imposition of the penalty, insures a careful observance of the law, and leaves in their own hands the power to escape even a risk of the fine being imposed, since they can refuse to take on board even the most doubtful case until certified by a competent medical authority to be entirely cured."

57th Con. 1st sess. S. Rept. No. 2119, p. viii;

57th Con. 2d. sess. S. Doc. No. 62."

It may be noted that the penalty to be imposed by the Secretary upon transportation companies for bringing to an American port an alien afflicted with a loathsome or contagious disease was by the Act of 1917 (Sec. 9) increased from $100 to $200; and by the Act of 1924 (Sec. 26) increased from $200 to $1,000.

The purpose of the mandatory provisions of our immigration statutes excluding aliens afflicted with loathsome or dangerous contagious diseases is to keep such aliens away from this country. And it is immaterial whether such an alien has previously acquired a residence or domicile in this country. The purpose of the provisions subjecting transportation companies to a penalty for wrongfully bringing to this country aliens so afflicted is to protect not only the passengers travelling with them, but ultimately to protect the people and citizens of the United States from the dangers arising from coming in contact with the alien so afflicted and also from the dangers arising from coming in contact with those who had been forced to associate with such afflicted alien aboard the vessel.

These dangers are just as pronounced and serious if the alien so afflicted is coming for readmission to an unrelinquished residence or domicile as if he comes seeking admission. An alien who has acquired a residence or domicile in this country is just as much an alien as if he had not made such acquisition. If an alien who has been in the United States and acquired a domicile goes away from the country and returns seeking readmission, he has no more right of re-entry than an alien who has never been in the country. And if such returning alien is afflicted with a loathsome or dangerous contagious disease or otherwise is a member of an excluded class, he is as positively excluded from readmission as he would be excluded from admission had he never before been in the country.

The alien returning to this country from a visit abroad may be admitted only in the discretion of the Secretary of Labor and it is repugnant to common sense to presume that a Secretary of Labor of the United States would permit an alien afflicted with such a loathsome and dangerous disease as leprosy to enter the United States, or would condone or hesitate to impose a penalty on a transportation company that would permit one so afflicted to mingle with other passengers on a voyage to this country. The mere fact that such an alien has acquired a domicile or residence in this country, but has not become a citizen, and had no right of return, and can reenter only at the discretion of the Secretary of Labor and on such conditions as he might prescribe, certainly would not secure the vessel and its officers from the

imposition of the penalty provided by law for such a flagrant violation of the well understood and universally recognized laws and rules of health and sanitation.

The hypothetical problem of Y. Ahin, mentioned at length on page 10 of appellant's brief, while in no way material here, is fully answered in Section 21 of the Act of 1917.

The case of *Compagnie Francaise de Navigation A Vaperu v. Elting, Collector of Customs,* (C. C. A. 2) 10 F2, 773, likewise is not material to the consideration of any question arising in the present case. In that case the only objection to the alien was his alienage. He did not return to this country afflicted with a loathsome or dangerous contagious disease, nor did he, while so afflicted, wrongfully mingle and come in contact with fellow-passengers on the voyage to this country, exposing them to possible contagion without their knowledge or consent. In that case the court said:

> "The plaintiff could not have known at the port of embarkation that the alien was inadmissible for that fact could be established only after a hearing by the immigration officials. * * * It can scarcely be supposed that Congress intended to penalize a vessel owner for transporting an alien privileged to come for such purpose."

It is well settled that the statutes should have sensible construction and one that will effectuate the legislative intention, and avoid if possible unjust and absurd conclusions.

Lau Ow Bew v. United States, 144 U. S. 47, 59;

United States v. Mrs. Gue Lim, 176 U. S. 459, 467;

United States v. Comr. of Immigration, (C. C. A. 1) 285 Fed. 295, 299.

It is submitted that the only sensible construction to be given the statute applicable in this case excluding aliens afflicted with a loathsome or dangerous contagious disease and penalizing a transportation company for bringing such an alien to an American port, is to exclude the alien and impose the penalty on the transportation company when the alien seeks readmission as well as when the alien merely seeks admission. This is the only construction that will effectuate the legislative intention and avoid unjust and absurd conclusions.

CONCLUSION

It is respectfully contended that aliens returning to an unrelinquished domicile of seven consecutive years do not constitute a class exempted from the excluding provisions of Section 3, and that the discretionary power given the Secretary of Labor by the Seventh Proviso authorizes the use of his discretion in admitting an alien returning to such a domicile only when such alien does not come within one of the classes expressly and mandatorily excluded by the provisions of that section; and that in this case the alien belongs to a class expressly and mandatorily excluded, and while many exceptions and exemptions are enumerated in the statute, none appear in favor of authorizing the admission of an alien afflicted with a loathsome or dangerous contagious disease; and that

whenever aliens so afflicted are mentioned or referred to in the statutes it is plainly evident that no intention was entertained for their admission. It is therefore respectfully submitted that the ruling of the District Court should be affirmed.

Respectfully submitted,

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No. 5131

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, FRANK GATT, and ROMEO TRONCA,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page-number appearing at the foot of page of original certified Transcript of Record.

United States District Court, Western District of Washington, Northern Division.

November, 1924, Term.

No. 9435.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK GATT, JOHN GATT, CHARLES ROMEO, JAMES ROSSI, ROMEO TRONCA, AUGUST BIANCHI, LEO MORELLI, ARINELLO PEPE, ANTONIO GARACE, and LOUIE CICCI,

Defendants.

INDICTMENT.

Vio. Sec. 37 Penal Code, Conspiracy to Violate Act of Oct. 28, 1919.

United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [2]

COUNT I.

That FRANK GATT, JOHN GATT, CHARLES ROMEO, JAMES ROSSI, ROMEO TRONCA,

AUGUST BIANCHI, LEO MORELLI, ARINELLO PEPE, ANTONIO GARACE, and LOUIS CICCI, and each of them, on or about *the in* the year of our Lord one thousand nine hundred and *twenty- within* the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously combine, conspire, confederate, and agree together, and one with the other, and together with divers other persons to the grand jurors unknown, to commit certain offenses against the United States, that is to say, to violate the provisions of the Act of Congress passed October 28, 1919, and known as the National Prohibition Act, it being then and there the plan, purpose, and object of said conspiracy and the object of said persons so conspiring together as aforesaid, and hereinafter referred to as the conspirators, to knowingly, willfully, and unlawfully possess and sell, in said division and district, certain intoxicating liquors, to wit, whiskey, distilled spirits, and divers other liquors containing more than one-half of one per centum of alcohol by volume, and fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, such possession being intended by them, the said conspirators, for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing of said intoxicating liquors in [3] violation of the National Prohibition Act,

such possession and sale of said intoxicating liquors by them, the said conspirators, as aforesaid, being unlawful and prohibited by the said Act of Congress. That it was then and there further the plan, purpose, and object of said conspiracy, and the object of said conspirators so conspiring together as aforesaid, to knowingly, willfully, and unlawfully conduct and maintain a common nuisance at certain premises within the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, to wit, 404 Fifth Avenue South, Seattle, Washington, by keeping, selling, and bartering therein certain intoxicating liquors, to wit, whiskey, distilled spirits, and divers other liquors containing more than one-half of one per centum of alcohol by volume, and fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, said maintaining of such nuisance by the said conspirators as aforesaid being unlawful and prohibited by the National Prohibition Act.

That said conspiracy was and is a continuing conspiracy, continuing from, to wit, the first day of March, 1923, to the time of the presentment of this indictment. [4]

OVERT ACTS.

1. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirator, LEO MORELLI,

on the 26th day of March, 1923, at said 404 Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there knowingly, willfully, and unlawfully possess and sell certain intoxicating liquor, to wit, two (2) ounces of distilled spirits, all of said liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, such possession by the said conspirator as aforesaid being then and there for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing of said intoxicating liquor, and such possession and sale of said intoxicating liquor being then and there unlawful and prohibited by the National Prohibition Act. [5]

2. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators JAMES ROSSI, ROMEO TRONCA, LOUIE CICCI and JOHN GATT, and each of them, on the 25th day of November, 1923, at said 404 Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there knowingly, willfully, and unlawfully possess and sell certain intoxicating liquor, to wit, eleven (11) ounces of whiskey, all of said liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for

beverage purposes, such possession by the said conspirator as aforesaid being then and there for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing of said intoxicating liquor, and such possession and sale of said intoxicating liquor being then and there unlawful and prohibited by the National Prohibition Act. [6]

3. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators JAMES ROSSI and LOUIE CICCI and each of them, on the 11th day of December, 1923, at said 404 Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there knowingly, willfully, and unlawfully possess and sell certain intoxicating liquor, to wit, four (4) ounces of whiskey, all of said liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, such possession by the said conspirator as aforesaid being then and there for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing of said intoxicating liquor, and such possession and sale of said intoxicating liquor being then and there unlawful and prohibited by the National Prohibition Act. [7]

4. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirator LOUIE CICCI, on the 24th day of December, 1923, at said 404 Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there knowingly, willfully, and unlawfully possess and sell certain intoxicating liquor, to wit, thirty-two (32) ounces of distilled spirits, all of said liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, such possession by the said conspirator as aforesaid being then and there for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing of said intoxicating liquor, and such possession and sale of said intoxicating liquor being then and there unlawful and prohibited by the National Prohibition Act. [8]

5. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators JAMES ROSSI and LOUIE CICCI, and each of them, on the 8th day of January, 1924, at said 404 Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there knowingly, willfully, and unlawfully possess and

sell certain intoxicating liquor, to wit, twelve (12) ounces of distilled spirits, all of said liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, such possession by the said conspirator as aforesaid being then and there for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing of said intoxicating liquor, and such possession and sale of said intoxicating liquor being then and there unlawful and prohibited by the National Prohibition Act. [9]

6. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators JAMES ROSSI and LOUIE CICCI, and each of them, on the 24th day of January, 1924, at said 404 Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there knowingly, willfully, and unlawfully possess and sell certain intoxicating liquor, to wit, four (4) ounces of distilled spirits, all of said liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, such possession by the said conspirator as aforesaid being then and there for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing

of said intoxicating liquor, and such possession and sale of said intoxicating liquor being then and there unlawful and prohibited by the National Prohibition Act. [10]

7. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators AUGUST BIANCHI, LOUIE CICCI, and CHARLES ROMEO, and each of them, on the 29th day of May, 1924, at said 404 Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there knowingly, willfully, and unlawfully possess and sell certain intoxicating liquor, to wit, twelve (12) ounces of distilled spirits, all of said liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, such possession by the said conspirator as aforesaid being then and there for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing of said intoxicating liquor, and such possession and sale of said intoxicating liquor being then and there unlawful and prohibited by the National Prohibition Act. [11]

8. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators LOUIE CICCI

and ROMEO TRONCA, and each of them, on the 22d day of September, 1924, at said 404 Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there knowingly, willfully, and unlawfully possess and sell certain intoxicating liquor, to wit, four (4) ounces of distilled spirits, all of said liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, such possession by the said conspirator as aforesaid being then and there for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing of said intoxicating liquor, and such possession and sale of said intoxicating liquor being then and there unlawful and prohibited by the National Prohibition Act. [12]

9. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators ARINELLO PEPE, FRANK GATT, and CHARLES ROMEO, and each of them, on the 28th day of February, 1925, at said 404 Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there knowingly, willfully, and unlawfully possess and sell certain intoxicating liquor, to wit, sixteen (16) ounces of distilled spirits, all of said liquor then and there containing more than one-half of one per centum

of alcohol by volume and then and there fit for use for beverage purposes, such possession by the said conspirator as aforesaid being then and there for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing of said intoxicating liquor, and such possession and sale of said intoxicating liquor being then and there unlawful and prohibited by the National Prohibition Act. [13]

10. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators ARINELLO PEPE, FRANK GATT, and CHARLES ROMEO, and each of them, on the 28th day of February, 1925, at Room 17, 404½ Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there knowingly, willfully, and unlawfully possess certain intoxicating liquor, to wit, twenty-five (25) gallons of distilled spirits, and seventy-two (72) one-fifth gallons of whiskey, all of said liquor then and there containing more than one-half of one per centum of alcohol by volume, and then and there fit for use for beverage purposes, such possession by the said conspirator as aforesaid being then and there for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing, and otherwise disposing of said intoxicating liquor, and such possession of said intoxicating liquor being then and

there unlawful and prohibited by the National Prohibition Act. [14]

11. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators, FRANK GATT, JOHN GATT, CHARLES ROMEO, JAMES ROSSI, ROMEO TRONCA, AUGUST BIANCHI, LEO MORELLI, ARINELLO PEPE, ANTONIO GARACE, and LOUIE CICCI, and each of them, from the 1st day of March, 1923, to the 28th day of February, 1925, at 404 Fifth Avenue South, Seattle, Washington, in said division and district, then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, whiskey, distilled spirits and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, said maintaining of such nuisance by the said conspirators as aforesaid being then and there unlawful and prohibited by the National Prohibition Act;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.
J. W. HOAR,
Assistant United States Attorney.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open court, in the presence of the Grand Jury, and filed in the U. S. District Court March 26, 1925. Ed. M. Lakin, Clerk. By S. E. Leitch, Deputy. [15]

[Title of Court and Cause.]

ARRAIGNMENT AND PLEA.

Now on this 20th day of April, 1925, all defendants come into open court for arraignment accompanied by their attorneys John F. Dore, A. F. Kirby, and H. S. Frye, and say that their true names are Frank Gatt, John Gatt, Charles Romeo, August Bianchi, Leo Morelli, Arinello Pepe and Romeo Tronca. The reading of the indictment is waived and each defendant now enters his plea of not guilty.

Journal No. 13, page 285. [16]

[Title of Court and Cause.]

RE-TRIAL.

Now on this 29th day of December, 1925, this cause is called for re-trial, pursuant to assignment. John F. Dore and F. C. Reagan and H. S. Frye are present as counsel for defendants, and C. T. McKinney and Thomas P. Revelle are present for plaintiff. Both sides are ready. Defendant Au-

gust Bianchi not being present in court is called three times in the corridor of the court and not responding, on motion of the U. S. Attorney, his bail is forfeited *nisi,* and bench-warrant is directed to issue. The regular panel of jurors having been exhausted additional jurors are drawn and the jurors having been admonished, recess is taken until 1:30 P. M. Counsel for August Bianchi advises the Court that he is present in court and ask for an order setting aside bail forfeiture which is denied at this time, but bench-warrant is recalled. At 1:30 the trial is resumed and the jury is impaneled and sworn as follows: W. E. Nims, John F. Schnaufer, U. L. Collins, John Hickey, Geo. N. Price, Frank A. Small, Samuel H. McElfatrick, Harvey N. Rothweiler, W. L. Wheeler, Joe Gardner, W. H. Motley, and Rollin Sanford.

It is ordered by the Court that the jury be kept together during the trial and the Marshal is directed to make arrangements for their accommodation. On motion of defendant, all witnesses on behalf of the Government are sworn, and excluded from the courtroom, except while testifying. The U. S. Attorney being permitted to retain Wm. M. Whitney for purposes of consultation. The witnesses now sworn are: Earl Corwin, A. A. Schafer, L. O. Shirley, Thos. P. Ragsdale, R. C. Jackson, John W. Hannum, Claude McCrory, E. F. Carrothers, R. C. Jackson, H. G. Backstrom, Richard A. Lambert, Earl Corwin, W. M. Whitney.

Government Exhibits Numbered 26, 38, 39, 40, 41, 42, 43, 47 and 48 are introduced as evidence.

Whereupon court stands adjourned.

Journal No. 14 at page 130. [17]

[Title of Court and Cause.]

TRIAL RESUMED.

Now on this 30th day of December, 1925, trial in this cause is resumed pursuant to adjournment. Jury and all parties are present. Government witnesses are sworn and examined as follows: Wm. M. Whitney, resumes testimony, C. W. Kline and Thomas P. Ragsdale. Pepe, recalled. Government exhibits now admitted in evidence are as follows and as per list in files. Numbers 1 to 25 inclusive, except 16 and 17 which are not offered; 27 to 37 inclusive; 44 to 46, inclusive; 49 to 55, inclusive; No. 56 denied and withdrawn by agent Whitney. The Government rests. H. S. Frye, attorney for Romeo Tronca, makes opening statement to the jury. Counsel for all other defendants waives opening statement. Defendants' witnesses are sworn and examined as follows: Romeo Tronca, H. S. Elliott, Wm. M. Whitney, W. R. Grisson, G. W. Johns, Howard D. Horton, Robert B. Hesketh, Martin J. Clary, E. B. Benn, Charles Romeo, Reilly juror) Frank Gatt, C. J. Francis, Albert Funis, John Gatt, A. Perfetti, Frank Staetai, and Mrs. Frank Gatt. Defendants' exhibits admitted in evidence are as follows: "A–4" to

"A–7," inclusive, as shown by list in files. "A–1" to "A–3," inclusive, as identified on former trial, not offered. Defendants rest. Witnesses in rebuttal are sworn and examined as follows: A. Pepe, recalled, Earl Corwin, recalled. Wm. M. Whitney, recalled and Earl Corwin, recalled. Both sides rest. Ten minute recess is declared. Cause is argued to the jury and the jury after being instructed by the Court and exceptions to instructions having been taken by the defendants the jury retires at 6 P. M. to deliberate of a verdict. It is agreed that a sealed verdict may be returned into court to-morrow morning if agreed upon by the jury before midnight, otherwise the jury to be put to bed at midnight until six o'clock to-morrow morning when they will resume their deliberations after having had breakfast.

Journal No. 14, at page 130. [18]

[Title of Court and Cause.]

TRIAL RESUMED—VERDICT RETURNED.

Now on this 31st day of December, 1925, all parties except John Gatt being present in court, and his counsel consenting to the receipt of the verdict in his absence, the jury now returns to the Court a sealed verdict finding all the above-named defendants guilty as charged in the indictment. Verdict is received and reads as follows: "We, the jury in the above-entitled cause, find the defendant Charles Romeo is guilty as charged in the in-

dictment herein; and further find the defendant August Bianchi is guilty as charged in the indictment herein; and further find the defendant John Gatt is guilty as charged in the indictment herein; and further find the defendant Frank Gatt is guilty as charged in the indictment herein; and further find the defendant Romeo Tronca is guilty as charged in the indictment herein. Rollin Sanford, Foreman." Verdict is acknowledged and jury is excused from the case.

On motion of the U. S. Attorney, the bail of Frank Gatt is increased to $3,000.00 and the bail each of the other defendants to $2,500.00 pending sentence, and defendants given until 5 P. M. to-day to file same. Sentence is continued to January 11, 1926.

Journal No. 14, at page 131. [19]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find the defendant Charles Romeo is guilty as charged in the indictment herein; and further find the defendant August Bianchi is guilty as charged in the indictment herein; and further find the defendant John Gatt is guilty as charged in the indictment herein; and further find the defendant Frank Gatt is guilty as charged in the indictment herein; and

further find the defendant Romeo Tronca is guilty as charged in the indictment herein.

ROLLIN SANFORD,
Foreman.

[Endorsed]: Filed Dec. 31, 1925. [20]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Come now the defendants in the above-entitled cause, and each of them, and move for a new trial of said cause, upon the following grounds, to wit:

1. Errors of law occurring at the trial and duly and regularly excepted to by said defendants.

2. That the verdict is contrary to law and the evidence.

JOHN F. DORE,
HERMON S. FRYE,
Attorneys for Defendants.

[Endorsed]: Filed Mar. 21, 1927. [21]

[Title of Court and Cause.]

HEARING ON MOTION FOR NEW TRIAL—SENTENCE PASSED.

Now on this 11th day of January, 1926, this cause comes on for hearing on motion for a new trial which is argued and said motion is denied with an exception noted. Sentences are passed at this time.

Journal No. 14, at page 149. [22]

[Title of Court and Cause.]

SENTENCE (CHARLES ROMEO).

Comes now on this 11th day of January, 1926, the said defendant Charles Romeo into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violating Section 37, Penal Code, conspiracy to violate the National Prohibition Act, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of 18 months at hard labor and to pay a fine of $500.00 dollars and costs of prosecution. And the said defendant is hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree No. 4, page 83. [23]

[Title of Court and Cause.]

SENTENCE (FRANK GATT).

Comes now on this 11th day of January, 1926, the said defendant Frank Gatt into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. Wherefore by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violating Section 37, Penal Code, conspiracy to violate the National Prohibition Act, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States for the term of 2 years at hard labor and to pay a fine of $2,500.00 dollars and the costs of prosecution. And the said defendant Frank Gatt is hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree No. 4, page 84. [24]

[Title of Court and Cause.]

SENTENCE (JOHN GATT).

Comes now on this 11th day of January, 1926, the said defendant John Gatt into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violating Section 37, Penal Code of the United States, conspiracy to violate the National Prohibition Act, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States for the period of 21 months at hard labor and to pay a fine of $2,000.00 and costs of prosecution. And the said defendant is hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree No. 4, page 84. [25]

[Title of Court and Cause.]

SENTENCE (AUGUST BIANCHI).

Comes now on this 11th day of January, 1926, the said August Bianchi into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violating Section 37, Penal Code, conspiracy to violate the National Prohibition Act, and that he be punished by being imprisoned in the King County Jail, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of six months and to pay a fine of $250.00 and the costs of prosecution. And the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree No. 4, page 84. [26]

[Title of Court and Cause.]

SENTENCE (ROMEO TRONCA).

Comes now on this 11th day of January, 1926, the said defendant Romeo Tronca into open court for

sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violating Section 37, Penal Code, conspiracy to violate the National Prohibition Act, and that he be punished by being imprisoned in the King County Jail, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of six months and to pay a fine of $250.00 dollars and the costs of prosecution. And the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree No. 4, page 85. [27]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

To the Above-entitled Court, and to the Honorable JEREMIAH NETERER, Judge Thereof:

Come now the above-named defendants, Frank Gatt, John Gatt, Charles Romeo, Romeo Tronca and August Bianchi, and by their attorney and counsel respectfully show that on the 31st day of December, 1925, a jury impaneled in the above-

entitled court and cause returned a verdict finding the defendants above named guilty of the charge set forth in the indictment in said cause, which indictment was theretofore filed in the above-entitled court and cause, and thereafter, and within the time limited by law, under the rules and order of this court, said defendants moved for a new trial, which said motion was by the Court overruled and an exception thereto allowed; and thereafter and on the 11th day of January, 1926, said defendants were, by order and judgment of the court above entitled, in said cause, sentenced as follows: Frank Gatt, 2 years McNeil's Island and fine $2,500.00; John Gatt, 21 months McNeil's Island and fine $2,000.00; Charles Romeo, 18 months McNeil's Island and fine $500.00; Romeo Tronca, 6 months King County Jail and fine $250.00; August Bianchi, 6 months King County Jail and fine $2,500.00 [28]

And, your petitioners herein, feeling themselves aggrieved by said verdict and the judgment and sentence of the Court herein as aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, now herewith petition this court for an order allowing them to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that the said proceedings as herein recited, and as more fully set forth in the assignments of error presented herewith, may be reviewed and the manifest error appearing

upon the face of the record of said proceedings and upon the trial of said cause may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and ruling of the Court provided; and wherefore, premises considered, your petitioners pray that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington may be reviewed and corrected, the said errors in said record being herewith assigned and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination said defendants be admitted to bail.

JOHN F. DORE,
HERMON S. FRYE,
Attorneys for Defendants.

[Endorsed]: Filed Mar. 21, 1927. [29]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Come now the above-named defendants, Frank Gatt, John Gatt, Charles Romeo, Romeo Tronca and August Bianchi, and in connection with their petition for writ of error in this cause, submitted and filed herewith, assign the following errors which said defendants aver and say occurred in the pro-

ceedings and at the trial in the above-entitled cause and in the above-entitled court, and upon which they rely to reverse, set aside and correct the judgment and sentence entered herein, and say that there is manifest error appearing upon the face of the record and in the proceedings, in this:

I.

The Court erred in admitting the testimony of W. M. Whitney, a federal prohibition agent, over the objection of the defendants, to which ruling, of the Court an exception was allowed, wherein the said Whitney testified in substance that the envelope, to-wit, Government's Exhibit 46, found in the pocket of the defendant Frank Gatt at the time of his arrest, bearing certain street numbers, said street numbers being described by the said Whitney as bootlegging joints. [30]

II.

The Court erred in admitting the testimony of the said Whitney as to a conversation he had with James Rossi, which was a mere recital by Rossi, who was acting as informer for Whitney, of what the defendants on trial were doing.

III.

The Court erred in refusing to tell the jury what such testimony was not permissible, and erred further in saying to the jury that such testimony could be considered against all of the parties if a conspiracy was established and it was made in furtherance of the conspiracy, on the ground that it was apparent and evidence that it was not made in fur-

therance of anything and that the Court by such an instruction was compelling the jury to pass upon a matter of law which belonged exclusively to the Court.

IV.

The Court erred in refusing to give an instruction that such testimony could not be considered against any of the defendants on trial.

V.

The Court erred in permitting the said Whitney to testify that Rossi told him whenever he came to arrest Frank Gatt to be careful to search his pockets for a pack of papers that would show that the said Gatt had been collecting protection money for the police and for the sheriff of King County from bootlegging joints; and in permitting the said Whitney to testify that Rossi was collecting for Gatt, who would pass the money on to the police and sheriff, the money being collected from bootlegging establishments other than the Monte Carlo; and in permitting the said Whitney to testify that as high as $12,000 a month was collected; and further, that the testimony given on cross-examination over objection, relating to the same matter, was reversible error. [31]

VI.

The Court erred in giving the instruction wherein conspiracy is defined as "a combination of two or more persons by concerted action to accomplish an agreement or unlawful purpose; the act itself is the essence of the charge."

VII.

The Court erred in giving the instruction as follows:

"Is any credence to be placed in the testimony of Pepe, or the statements made by Rossi to Whitney, as disclosed by Mr. Whitney. Pepe says that a conspiracy was formed. Whitney said what Rossi told him with relation to the activities of the defendant Frank Gatt. From the statements of both of these parties they were parties to the conspiracy. Pepe said what Gatt did, that he acted under the direction and supervision of Gatt; that the holding of the bill of sale which was executed in January, 1925, was without his knowledge—he knew nothing about it—it was given to him by Frank Gatt and that Gatt told him what his name was to be henceforth; and you heard his testimony with relation to statements made to him by Frank Gatt with relation to the conduct of the parties. Now you are instructed that Pepe's testimony, likewise the statement of Mr. Rossi under the law are denominated accomplices, and the testimony of an accomplice is from a polluted source. Now the testimony of an accomplice should be received with care and caution and subjected to careful scrutiny in the light of all of the other evidence in the case; and the jury ought not to convict upon the testimony of an accomplice alone unless after a careful examination of such testi-

mony the jurors are satisfied beyond a reasonable doubt of its truth and that they can safely rely upon it."

VIII.

The Court erred in instructing the jury as follows:

"Did the exhibits that were taken from the person of Mr. Frank Gatt, did they show any corroboration of the witness Pepe's testimony, as disclosed upon the witness stand, or the testimony of Mr. Whitney as given here."

IX.

The Court erred in giving that part of his instruction beginning with the words, "I think I want to say something else," and ending with the words "judicial notice." [32]

X.

The Court erred in passing upon the exception, wherein he told the jury that they could consider Rossi's statement as disclosed by Mr. Whitney with all the other statements in the case.

XI.

Thereafter, and within the time limited by law and the order and rules of this Court, said defendants moved for a new trial, which said motion was overruled by the Court, and an exception allowed, which ruling of the Court the defendants now assign as error.

XII.

And the Court thereafter entered judgment and sentence against said defendants, upon the verdict of guilty rendered upon said indictment, to which

ruling and judgment and sentence the defendants excepted, and now the defendants assign as error that the Court so entered judgment and sentence upon the verdict.

And as to each and every of said assignments of error, as aforesaid, the defendants say that at the time of making of the order or ruling of the Court complained of, the defendants duly excepted and were allowed an exception wherever the same appears in the record to the ruling and order of the Court.

JOHN F. DORE,
HERMON S. FRYE,
Attorneys for Defendants.

[Endorsed]: Filed Mar. 21, 1927. [33]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF BOND.

A writ of error is granted on this 11th day of January, 1926, and it is further ordered that, pending the review herein said defendants be admitted to bail, and that the amount of supersedeas bond to be filed by said defendants be Frank Gatt, $5,000.00; John Gatt, $5,000.00; Charles Romeo, $3,000.00; August Bianchi, $1,500.00, and Romeo Tronca, $1,-500.00.

And it is further ordered that, upon the said defendants filing their bonds in the aforesaid sum, to be approved by the Clerk of this court, they shall

be released from custody pending the determination of the writ of error herein assigned.

Done in open court, this 11th day of January, 1926.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Mar. 21, 1927. [34]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING APRIL 10, 1926, TO FILE BILL OF EXCEPTIONS.

For good cause shown, IT IS HEREBY ORDERED that the time for filing the bill of exceptions in the above-entitled cause in the above-entitled court be and the same hereby is extended to and including the 10th day of April, 1926.

Done in open court this 22 day of March, 1926.

JEREMIAH NETERER,
Judge.

General Order Book No. 12, at page 172. [35]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 29th day of December, 1925, at the hour of ten o'clock in the forenoon, the above-entitled cause came on regu-

larly for trial in the above-entitled court, before the Honorable Jeremiah Neterer, Judge thereof, the plaintiff appearing by T. P. Revelle, United States Attorney for said District, and C. T. McKinney, Assistant United States Attorney, and the defendants Charles Romeo, August Bianchi, John Gatt and Frank Gatt being present in person and by their counsel, John F. Dore, and the defendant Romeo Tronca being present in person and by his counsel, Hermon S. Frye.

A jury having been regularly and duly impanelled and sworn to try the cause, and the Assistant United States Attorney having made a statement to the jury, the following evidence was thereupon offered:

TESTIMONY OF ADAM A. SHAFER, FOR THE GOVERNMENT.

ADAM A. SHAFER, a witness produced on behalf of the United States, being duly sworn, testified as follows: [36]

Direct Examination.

That on March 25, 1923, I went to the Monte Carlo Pool-room and bought two drinks over the bar from the defendant Bianchi. He rang the money up in the cash-register. The same thing occurred on the 26th.

That on March 28th, we went in there at the noon hour and bought two drinks from Bianchi. We asked the man in there for a bottle, he said, "I will get you a bottle," and he went out through the

(Testimony of Adam A. Shafer.)

back way into the alley; we stood at the end of the bar waiting for him to come back; in the meantime two police officers came in and were talking to Frank Gatt,—were standing in the middle of the floor in front of the bar; this man came in the front door with the bottle, and Frank Gatt grabbed him by the arm, turned him around and said something to him, and the man kept going through the place, through the pool-hall out into the alley; we followed him thinking we would identify him later, and he jumped into a Chinese laundry back in there; we waited for about half an hour, he did not come back; we reported it to Mr. Whitney, and that afternoon they got thirty gallons of liquor there. Mooring, who is now dead was there at the time. Frank Gatt came in just a few minutes before this man went out after the bottle and he was walking up and down in front of the bar. There was nobody else in there at that time; there were quite a number of men in back in the pool-room; there is a pool-room in the back and some card-tables on the side there.

I saw Bianchi and Romeo, and Frank and John Gatt; I think this Tronca was there, too.

In March, 1923, Romeo was a bottleman. [37]

TESTIMONY OF ARINELLO PEPE, FOR THE GOVERNMENT.

ARINELLO PEPE, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I worked at the Monte Carlo, which is a pool-room, restaurant and barber-shop. I worked for Frank and John Gatt at the Monte Carlo. There is a bar there. I started to work in July, 1924, and worked there from July 24, 1924, to August 20, 1925. My first occupation was a bottleman. I carried a bottle in my pocket. When the bartender called for the bottle I would hand it to him across the bar, and when he got through with it he handed it back to me. I got this bottle in room 17 in the Paul House just above the Monte Carlo. There was on an average ten or twenty gallons of whiskey in room 17 in the Paul House right along. I worked from three o'clock in the afternoon to one in the morning. Bianchi paid me my salary. Bianchi got the money from John Gatt. When the bartender quit I became bartender. I worked as a bottleman about five or six months and was bartender a little over a month,—about a month. I sold lots of intoxicating liquor at the Monte Carlo and rang the money up in the cash-register. I took the money out of the register and I put it in the sack and leave $25.00 in the register all the time. I put the balance right in the safe. The safe was

(Testimony of Arinello Pepe.)

open when I started to work and I would close it when I went out. When I leave at night I would put the money in the safe and close the safe. I don't know who opened it in the morning; Bianchi or John Gatt or Tronca together. It was open all day. I never had the combination to the safe. I got the key to room 17 from the bartender. Frank Gatt hired me to work there; the wages were $110 a month. [38] I asked Frank Gatt once for more money. He said he was not making money enough to pay more. I asked him for more money when I became bartender. He said he can't afford to pay any more. Frank Gatt asked me to become bartender when I was in the Monte Carlo. I once told Frank Gatt that I was going to quit, I didn't have enough money, I wanted to quit, he said,—I ask him for job at the mine, to stay there; I never was quitting any more; go on the donkey-engine; he said as soon as the mine opens he gives me job at the mine running the donkey-engine; I didn't quit the Monte Carlo only for that proposition.

On February 28, 1925, Frank Gatt was in the place. I was in the Monte Carlo the night the Federal officers raided it. I had a bottle in my pocket if someone wanted a drink. I didn't sell that night; just asked me to get the bottle, I did and handed it to him and to give it to him right on the table. That was February 28th. Frank Gatt was there. He said, "Get the bottle"; I do, he was the boss. I got the bottle from room 17 and handed

(Testimony of Arinello Pepe.)

it to him when he was right in the office. It was Scotch whiskey. He gave it to somebody in the office. I had a pint of whiskey in my pocket the night I was arrested. I got out on bond Monday. Frank Gatt and his wife and kids was there. Also Bianchi, Tronca and Charley Romeo were there.

I am not an American citizen.

I went to Frank Gatt's house with August Bianchi. I was right in front of the Monte Carlo and telephone for me to August Bianchi, [39] and he tell me that, and we went to August Bianchi up to his house in an automobile.

Frank Gatt gave me a bill of sale to the Monte Carlo, that morning.

The next morning I met him with Charley Romeo. They gave me Government's Exhibit 26, and said my name was to be Tony Saracca. Bianchi was the morning bartender. On February 28th, Frank Gatt took the money out of the cash-register. I got the bill of sale on March 3d. I never heard the name of Tony Saracca until that date (March 3d).

I worked at the Monte Carlo from July, 1924, down to 1925, at $110 per month. I became bartender in January, 1925. I was getting $110 at the time and Bianchi paid me at the end of the month. Any time I need a little money I draw and the rest at the end of the month,—he gave me the rest. After I became bartender I take the pay myself, not all though, I take what I need from the register; make out a little slip and put it in the register.

(Testimony of Arinello Pepe.)

During 1925 I take the money myself and put a slip in the register. August Bianchi pay my wages and get from Johnny Gatt. I see him get it from Johnny Gatt myself. Johnny Gatt gave it to me a couple of times, Johnny Gatt and Frank Gatt, both of them. The bartender ahead of me gave me a key to room 17. I got it from him the first day I went to work in the Monte Carlo, July, 1924. The key I had to room 17 was the only key to room 17 that I knew anything about. I had that key since the first of the new year, 1925; I had it all the time myself, because I was bartender alone all the time. I didn't collect any money at all from the boot-black stand, the barber-shop or the restaurant. Johnny Gatt sold that barber-shop for three or four hundred dollars, I don't know how much; I think three hundred dollars. [40]

Them two fellows that are inside now bought the barber-shop. Johnny Gatt gave them the receipt. I never pay any rent to the Rainier Light & Power Company; was Mr. August Bianchi pay; Johnny Gatt gave me the money.

The first time I started paying the rent was the first time after I was out of the Immigration Station, the 3d of March. In January, 1925, I was come to the Rainier Power Company and pay the rent; Johnny Gatt gave that money to me and go ahead and pay the rent, and I did, and I never see anybody.

I was telling you, on the 3d of March when I was go out of the Immigration Station, first time I pay

(Testimony of Arinello Pepe.)

rent was me and August Bianchi together, Johnny Gatt gave us the money. I was up at Gatt's house, on Beacon Hill. We rode up there in a car we got in front of the Monte Carlo.

Johnny Gatt wrote that and I signed it at Johnny Gatt's request, at the same time August Bianchi tell me, he said Johnny Gatt wanted me to sign that. My name was supposed to be Tony Saracca at that time but it was Arinello Pepe.

Johnny Gatt got $1,000 from the Chinaman. I didn't get any money. I just look at it on the table.

I am now working at water main and sewer ditch, pick and shovel. Before I go to Monte Carlo I worked as a laborer or anything.

TESTIMONY OF JOHN W. HANNUM, FOR THE GOVERNMENT.

JOHN W. HANNUM, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination. [41]

I am a minister. I have visited the Monte Carlo on May 13, 1924, and bought a drink there from a man named James Rossi. I went there again on May 13th. The same thing happened. We went back through the glass door in front there, and was quite a group of men in there, some of them playing pool on tables in the back part of the pool-room, and a group of men standing around; as we went up to the bar,—were two other men with me, Mr.

(Testimony of John W. Hannum.)

Backstrom and Mr. Walker, and Mr. Strange,—the four of us got near up to the bar and Strange asked for a shot of moonshine, and the man behind the bar whistled and another man stepped out of the bunch, the man who was back towards the outside, and came forward and pulled a bottle out and handed it across the counter to this man, and he poured out four little glasses of whiskey. The man back of the bar took the money and put it in his pocket. The man did the same thing the first time. Mr. Strange paid for it both times.

McCRORY'S TESTIMONY.

On December 11, 1923, I bought drinks from Rossi and Cicci. In January and February I purchased drinks from Rossi. In March I did the same, and likewise in May. Agent Carruthers and myself went to the Monte Carlo, we each purchased two drinks of moonshine whiskey from Jim Rossi; Cicci was acting as bottleman; passed the bottle over the bar, as he always does on each occasion; we each gave him, Rossi, fifty cents for the two drinks; I asked for a half pint of moonshine whiskey; Rossi directed Cicci to go back and get a half pint, which he did, and he went back and passed the bottle over to Rossi and he in turn handed the bottle to me, and I gave him $1.00 for it. That is the bottle we bought from James Rossi on January 8th and which we thereafter delivered to Bill Whitney. Rossi rang the money up in the cash-register. [42]

(Testimony of —— McCrory.)

In June at different times I bought drinks from Rossi, Cicci and Bianchi. I was in there for lunch on this date, sitting at the lunch-counter looking through the mirror back there to see what was going on at the bar behind me. Several men came in and purchased drinks over the bar from Rossi and Cicci acted as bottleman. The mirror was back of the lunch-counter. The lunch-counter would be on the south side of the building, straight across from the bar and I could see through the mirror what was going on behind me.

I went to Monte Carlo on February 14th with a man by the name of Diller and I purchased two drinks of moonshine whiskey from Jim Rossi and Cicci; I gave him fifty cents for the two drinks, and the money was rang up on the cash-register. On February 20th I went in alone and purchased a drink from Rossi, for which I paid twenty-five cents. He rang the money up in the cash-register.

I went to Monte Carlo on March 8th, about ten o'clock in the morning and I purchased one drink of moonshine from Bianchi and gave him twenty-five cents, and the money was rang up on the cash-register.

Agent Carruthers and myself went to the Monte Carlo on May 5th, went to the bar and ordered drinks from Jim Rossi, Cicci was acting as bottleman; we each purchased two drinks of moonshine whiskey, and we each gave him fifth cents for the two drinks; the money was rang up in the cash-register.

(Testimony of —— McCrory.)

Frank Gatt was standing at the office door at the time. The bar would be like this and the office would be on the west end of the bar,—west end of the bar. There was a door leading [43] from the office behind the bar. There was another door that led out into the main part of the room from the office. Frank Gatt was standing in the door back of the bar. He was looking out at the bar, at the crowd whoever was there.

On May 8th, in company with Agent Carruthers, we went to the Monte Carlo and we each purchased two drinks of moonshine whiskey, gave him fifty cents each for the drinks, the money was rang up in the cash-register.

On May 26th, about ten o'clock in the evening, Agent Corwin and myself went to the Monte Carlo, James Rossi was behind the bar, and I ordered two drinks of moonshine whiskey and the bottle was passed over the bar by Cicci, and James Rossi served the drinks; Corwin ordered two more drinks, and went through the same way, and I ordered a half pint from Rossi; he sent Cicci to the back end of the place to get the half pint, he brought it back and Cicci passed the bottle over to Rossi, and Rossi in turn gave me the bottle and I gave him the $1.00 for the bottle, and he rang it up on the cash-register.

This is the half pint I bought on the 26th from Jim Rossi and which I thereafter delivered to Bill Whitney.

Frank Gatt was present, standing in the office door when I bought it.

(Testimony of —— McCrory.)

About eight o'clock in the morning of May 29th, 1924, Agent Lambert and I went to Monte Carlo, Bianchi was behind the bar, and we each ordered two drinks of moonshine whiskey; we each gave him fifty cents for the two drinks and he rang it up on the cash-register; I ordered half a pint from Bianchi, and he sent Cicci, the bottleman, to get the half pint, and he handed it to me and I gave him $1.00 and he rang it up on the cash-register. [44]

On June 13th, I went there alone and purchased two drinks of moonshine from Jim Rossi and Cicci, and gave him fifty cents for the drinks, and he rang that up on the cash-register.

On June 14th I went alone and purchased two drinks from Bianchi, gave him fifty cents for the drinks and he rang that up on the cash-register. As I remember Cicci was present with Bianchi.

On July 11th, I went there again in the morning and purchased two drinks from Bianchi, and gave him fifty cents for the drinks and he rang them up on the cash-register.

As I remember it the bottleman there was Tronca. I paid Bianchi for the drinks.

On August 29th, I went there alone and I purchased two drinks from the old bottleman named Cicci; he was behind the bar at this time; I gave him fifty cents for the two drinks and he rang the money up on the cash-register.

In July 11, 1924, I bought drinks, the bottleman

(Testimony of —— McCrory.)

was Tronca. In August I bought drinks from Cicci, and also in September and October.

Cross-examination.

On September 22d I saw Romeo and Tronca there about two o'clock in the afternoon. Romeo Tronca was bottleman.

Tronca was also there on September 25th, also October 27 and 29. I never bought of Tronca.

TESTIMONY OF ERVEN H. CARRUTHERS, FOR THE GOVERNMENT.

ERVEN H. CARRUTHERS, a witness produced on behalf of the Government, being duly sworn, testified as follows: [45]

Direct Examination.

I am a Federal Prohibition Agent. I was with McCrory at the times described by him, when he purchased the liquor from Rossi, Cicci and Bianchi.

Agent McCrory and I went in the place and James Rossi was behind the bar, and Lewis Cicci was out in front of the bar, Lewis Cicci was the bottleman, and McCrory and I stepped up to the bar and spoke to Rossi, and asked him for a drink of Scotch whiskey; Rossi spoke to Cicci and asked for the Scotch whiskey bottle. Cicci removed the bottle from his hip pocket and handed it over the bar to Rossi and Rossi served the drinks; we purchased two drinks apiece, and then he handed the bottle back to Cicci, and he handed the bottle back

(Testimony of Erven H. Carruthers.)

to Cicci, and he put the bottle in his pocket. McCrory and I each paid Rossi $1.00 or fifty cents apiece for the drinks, and he rang the money up on the cash-register.

On January 8th, 1925, McCrory and I entered the place, and Rossi was behind the bar and Cicci was in front of the bar; we each asked for a drink, and Rossi asked Cicci for the moonshine bottle this time, and he removed the bottle from his hip pocket handed it over the bar the Rossi, and Rossi served each of us two drinks; we each paid fifty cents for the drinks, and Rossi rang the money up on the cash-register. McCrory asked Rossi if he would sell him half a pint; at this time Rossi asked Cicci to go get a half pint, as Cicci went out the back door of the place he returned in a short time with a half pint of moonshine whiskey, going to the end of the bar and Rossi came and got the half pint and came and put it on the center of the bar, and handed it over the bar to McCrory; McCrory paid him $1.25 for the half pint and he rang it up on the cash-register.

On May 5th I went again. Rossi was behind the bar, Cicci [46] was in front of the bar; we each purchased two drinks of moonshine going through the same maneuvers as before; Cicci had the bottle in his pocket, and during this transaction Frank Gatt was standing in the office door, like this would be the bar, and the office would be at the other end, and Frank Gatt was standing facing the bar, so that he was looking at us when the transaction took

(Testimony of Erven H. Carruthers.)

place; the money was rung up on the cash-register.

September 22d was the next time I was in there. Cicci was behind the bar, and Romeo Tronca was bottleman. He had the bottle in his pocket, and we stepped up to the bar and Lew Cicci was behind the bar, and each asked for a drink of moonshine, and the liquor was served, as on former occasions, and the money was rung up on the cash-register.

On September 28th I went there again. Cicci was behind the bar, and Charles Romeo was sitting on a stool over near the lunch-counter, and he did not have the bottle, but I see him nod his head to some other people that came into the bar and ask for drinks. He was sitting at a stool at the lunch-counter like the bar would be on this side of the room, and the lunch-counter was on the other side of the room, and he was sitting at the lunch-counter facing the bar.

Cross-examination.

I was there on the forenoon of the 22d of September. Romeo Tronca was acting as bottleman at that time. I am certain he was there.

TESTIMONY OF R. C. JACKSON, FOR THE GOVERNMENT.

R. C. JACKSON, a witness produced on behalf of the Government, [47] being duly sworn, testified as follows:

Direct Examination.

On June 11, 1924, together with Agent Corwin, I bought a drink from Jim Rossi. He was the bartender at the Monte Carlo.

TESTIMONY OF H. G. BACKSTROM, FOR THE GOVERNMENT.

H. G. BACKSTROM, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

On May 13, 1924, I bought a drink at the Monte Carlo from James Rossi. The money paid for the drink was rung up on the cash-register.

TESTIMONY OF R. A. LAMBERT, FOR THE GOVERNMENT.

R. A. LAMBERT, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

On May 29, 1924, Bianchi was behind the bar and Cicci was in front of the bar at the Monte

(Testimony of Earl Corwin.)

Carlo. Agent McCrory and I bought drinks from Cicci and Bianchi. McCrory handed him $1.00 and he rang that up on the cash-register, and we left the place.

TESTIMONY OF EARL CORWIN, FOR THE GOVERNMENT.

EARL CORWIN, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I was a prohibition agent on January 14, 1924, I bought liquor from Jim Rossi at the Monte Carlo. In March I did likewise. Cicci and Rossi aided in the sale. Several times in April I purchased drinks from Rossi and Cicci, and also in May. In June, 1924, [48] I bought of Rossi. On February 28, 1925, I served a federal search-warrant on the Monte Carlo. Frank Gatt and a number of other people were in the office, sitting at a table, upon which was a bottle of whiskey and whiskey glasses. I searched Pepe the bartender and took from him a key to room 17 of the St. Paul Hotel. There was a cache in this room that contained various kinds of intoxicating liquor. Frank Gatt had the combination to the safe. He took the money from the cash-register and put it in the safe. Frank Gatt protested against the bar and fixtures being destroyed. Tronca was not there that night, neither was John Gatt.

(Testimony of Earl Corwin.)

The first time I visited these premises was January 14, 1924, I believe. I went there with Agent McCrory on that date and purchased two drinks of moonshine from the bartender, Jimmy Rossi, and a man by the name of Cicci acted as bottleman at that time. I bought two drinks of moonshine for each of us paying twenty-five cents a drink. The money was rung up in the cash-register.

I went there again on February 11, 1924, and bought three drinks from the bartender, James Rossi, and paid twenty-five cents apiece for a drink.

Cicci was the bottleman and handed the bottle over the bar to Rossi, Rossi served the drinks, I paid Rossi the money. It was rung up on the cash-register.

I was back there again on March 7th, and I purchased two drinks of moonshine whiskey from Rossi, Cicci was bottleman; I remained in the place about fifteen or twenty minutes, had some conversation with Rossi, about the election that was coming up; I asked him what all he had, and he said, "We haven't got anything here but moonshine tonight, but if the election goes right we *will other* things to drink after the election" intended to put [49] *to put* in gin and bonded whiskey, bourbon and Scotch.

On March 27th I was in and bought three drinks of moonshine whiskey from Rossi, and paid him twenty-five cents a drink; Cicci was acting as bottleman at that time. There were customers standing outside buying drinks over the bar, buying first off

(Testimony of Earl Corwin.)

of Rossi and Cicci. The money was rung up in the cash-register.

I went there in the evening of April the 8th and James Rossi was behind the bar; I purchased one drink of bourbon whiskey from Rossi and Cicci.

On April 26th I was there again and bought three drinks of Scotch from Rossi, Cicci was acting as bottleman, had the bottles in his pocket, and handed them over the bar; I paid Rossi fifty cents a drink for the Scotch, and at that time Frank Gatt was standing in the office door looking out along the length of the bar.

On May 3d, I went again and purchased two drinks of Scotch from Rossi and Cicci and Gatt was also present on that occasion. He was standing behind the bar near the office door.

On May 6th I bought three drinks of Scotch in there from Rossi and Cicci; Frank Gatt was standing outside of the bar with four Italians, they were being served by Rossi and Cicci; were a number of other people standing at the bar, and Gatt rapped on the bar with some money;—wanted Rossi to come and wait on him; Rossi called out something to him; I didn't understand what, and Gatt came behind the bar and Cicci handed the bottle over the bar to Gatt, and Gatt served the drinks to the four Italians and took one himself from every round of drinks served, and Gatt took the money for it and rang it up on the cash-register.

On May 26, 1924, I went back there with Agent McCrory and bought two drinks of moonshine whis-

(Testimony of Earl Corwin.)

key and half pint of moonshine [50] whiskey from Rossi, Frank Gatt was present at that time standing behind the bar.

On June 11, 1924, I went back again with Agent Johnson. Purchased two drinks of Scotch whiskey from Rossi.

February 28th, I believe, I was in possession of a federal search-warrant and accompanied by Agents Johnson, Linville, Kline, Mooring (now dead), and Indian Agent Shirley. We went in the place in the front door, and served the search-warrant on Arinello Pepe who was behind the bar, searched him and from his person took a pint bottle of whiskey, and later on I searched him and found a key in his hat.

In the office at the west end of the bar I found Frank Gatt and a number of other people, among them Frank Gatt's wife and two children, on a tray on the table in that room were five whiskey serving glasses and each glass contained a small quantity of whiskey, and from the person of one of the men in the room I took a quart bottle of whiskey.

Frank Gatt and his wife, two children, Detective Samuelson and Detective Cleary, of the Seattle Police Department and the agents that accompanied me on the raid were present.

After I had arrested the defendants behind the bar and in the office, I left one of the agents in charge, and went up to room 17 of the St. Paul Hotel where Agent Whitney was, and where he had

(Testimony of Earl Corwin.)
found a quantity of intoxicating liquor, and he returned to the office of the Monte Carlo, and searched a portion of the defendants; I searched Arinello Pepe, the bartender, and from his cap I took a key that fitted the lock to room 17 of the St. Paul Hotel, that is a hotel directly above the Monte Carlo. From the person of Frank Gatt I saw Mr. Whitney take a number of cards and memorandum of various sorts. [51]

This is Exhibit No. 33, the key that I took from the cap of Arinello Pepe, the lock to room 17 of the St. Paul Hotel which was unlocked by that key to the lock of the mechanism of the cache,—that is the lock to the room,—the door to the room, and the locking mechanism of the cache whereby a secret contrivance was operated by clothes hooks in the room.

The closet in the northeast corner of this room has been built over,—a door built over it which could not be seen, slid in the wallpaper, and was built out from the door with a curtain hanging over it. By operating a clothes hook over the door it actuated this mechanism and allowed this secret door to open, giving access to this clothes closet. This clothes closet was fitted up as a cache and contained a large quantity of intoxicating liquor,—brandy, Scotch, gin, vermouth, absinthe, moonshine whiskey, colored and not; several kinds of liquor.

There was something in the neighborhood of thirty gallons of moonshine whiskey and seven or

(Testimony of Earl Corwin.)
eight cases of assorted liquors, that is, imported liquors, in the room.

After seizing these intoxicating liquors I returned to the Monte Carlo,—made a complete search of the room, and I found a bottle containing moonshine whiskey cached around in the storeroom and under the bar; under the back bar found various items and papers some of which were in a brief case, the property of Frank Gatt.

This brief case was setting in a bottle rack behind and under the back bar.

The entire premises are described as follows: The premises known as 404 Fifth Avenue South is a storeroom faces west on Fifth Avenue South; upon going into the door,—just before going into the door the barber-shop is on your left-hand side; going inside the door is the office with a door leading [52] into the office from the outside of the bar; directly in the rear of the office is the bar about 30 or 35 feet long, full back bar behind it. At the east end of the bar is a stove, a large icebox and in the rear of that a large room fitted up with billiard and pool tables, and I believe a few card-tables as well; there were several smaller rooms; it was in the back room that he had his storeroom and lavatory.

The bar was one of the old-fashioned bars; full mahogany bar; the back bar had a large mirror in it the full length of it, and underneath the bottom part of the bar was fitted up with compartments to hold bottles, and in one of the compart-

(Testimony of Earl Corwin.)

ments was where I found the brief case; and also in the back bar seven or eight holders in all of which we found various papers and documents.

The brief case contained the articles of incorporation and stock-book, I believe, of the Outlook Mining Company, of which Frank Gatt was listed as one of the directors; also contained the names of other directors and stockholders of the company and officers of the company.

The names of defendants James Rossi, Romeo Tronca, and I believe, August Bianchi, Matt Starwich,—Frank and John Gatt, appeared in the book. Also Charles Romeo and two or three other names I do not recall.

Gatt stated that he was in the mining business, that was his sole business, and he used the Monte Carlo as his office.

There was a safe in the place but it was not open on the night we raided it. I asked the defendants that were present if any of them had the combination of the safe; all of them denied having it, and I told them collectively I would have to open the safe myself if it was not opened, and Frank Gatt stated, "It is a [53] shame to spoil a good safe like that. I will open it for you, I have the combination"; and he opened the safe; we made a search of the safe and found a small quantity of money in it.

When Frank Gatt was leaving the place he took the money from the cash-register and placed it in the safe.

(Testimony of Earl Corwin.)

As we were demolishing the bar Frank Gatt objected at least half a dozen times, saying, "That is a shame to spoil that bar, perfectly good bar; that we had done enough damage that night; no use of going any further, everything was closed, that we had the place; to let it go that way."

He said it was a shame to break that up, he could use it again, if it was not destroyed, in some other place.

I had a conversation with all the defendants that night. I questioned them all and took their personal history; asked them about their interest in the place. I first questioned Arinello Pepe and he stated to me at that time he was employed there by a man, whom he did not know; had been working there for four or five months; and I questioned Charles Romeo and he stated he had been an owner of the place, but had sold out some three or four months prior to the time of the raid. As I recall Bianchi denied having anything to do with it at all. John Gatt was not there at the time of the raid; Frank Gatt denied he had anything to do with it for over a year past. I talked that night to Frank Gatt, August Bianchi, Charles Romeo, Arinello Pepe and Lew Morelli.

TESTIMONY OF W. M. WHITNEY, FOR THE GOVERNMENT.

W. M. WHITNEY, a witness produced on behalf of the Government, being duly sworn, testified as follows: [54]

Direct Examination.

I am the legal adviser of the Prohibition Department. In November, 1923, I bought liquor of Rossi and Cicci.

I was there in March, I believe, 1923, was the first,—I may have been in there in 1922; I have been in and out of those premises ever since I have been connected with the office.

On November 25, 1923, in the evening about nine o'clock on Sunday evening, as I recall, I was in the lower end of town making some investigations, and I noticed a number of men going into the Monte Carlo so I followed, and walked in,—walked right in with them as if I was a member of the party; they walked up to the bar; there are swinging doors as you enter these premises, then immediately to the left there was an office, and then just to the east of this office there was a long bar on the right-hand side as you enter, and to the south there was a restaurant and lunch-counter, in the rear of that a number of pool-tables and card-tables; was oh, about fifteen men standing at the bar drinking when I went in. Jim Rossi was behind the bar, a man by the name of Cicci was in front of the bar. These men would order drinks and the bar-

(Testimony of W. M. Whitney.)

tender, I heard him ask him if he wanted the white or the red, and whichever it was, white or red, Cicci would take a bottle out of his hip pocket, pass it over the bar and bartender Rossi would pour the drinks. When they came down to where I was standing he asked me what I wanted, I just laid a half-dollar on the bar,—was acting as if I was a member of this party, and I said, "I would have some of the red"; Cicci passed the red bottle over the bar and Rossi poured me out a glass of whiskey; I paid Rossi fifty cents, the bottle was passed back to Cicci by Rossi, and the fifty cents was rung up on the cash-register. After I had that drink I asked Rossi if I could get half a pint of that, [55] "That is pretty good stuff, I would like to get a half-pint of that whiskey'; rather a stillness fell for a moment, and John Gatt,—something was said by Rossi, and John Gatt was standing in the doorway of this office; as I recall it there was a curtain that partially shut off the doorway from behind the bar into the office, and there was a door that entered the office there in front of the bar; as you entered the office there in front of the bar; as you entered into the main part of the barroom there was also an entryway that went from behind the bar into this office, and there was a curtain, as I recall it, partially pulled back, and John Gatt was standing there, and Gatt and another man that was standing in front of the bar engaged me in conversation, wanted to know who I was, and wanted to know what I was, and who I knew

(Testimony of W. M. Whitney.)

around there; and I said, "Yes, I knew a number of men around the courthouse," I mentioned two or three I knew, and John Gatt then said, —nodded his head and said, "All right"; Romeo Tranca was in there, although he didn't seem to take any part in anything that occurred in the room at the time. After Gatt told,—John Gatt told Rossi it was all right, Rossi then said to Cicci,—nodded his head and said, "All right," and Cicci left the room and was gone a couple of minutes, went out the back and came back, and while he was gone I ordered another drink and also bought a drink for a man that was standing at the bar next to me, and it was served in the same way, except that Rossi had a bottle there underneath the bar, and poured these drinks out, and I paid him $1.00 for the two drinks, and the money was rung up in the cash-register; then in a short time Cicci came back, passed the half-pint bottle over the bar and Rossi then passed it to me and I paid him $3.00 for that half pint of whiskey; the [56] bottle is on the table that I purchased: I retained that bottle.

I retained it in my locker that I have in the Prohibition Office for a few days, and turned it over to Agent Kline.

I was in these premises at the time of the raid, February 28th, 1925. I was there also in December, I believe, either the day before or the day after Christmas, in 1924, when there was a raid at that place; I didn't go with the officers at first, but

(Testimony of W. M. Whitney.)

came down before they left, at which time they had Lew Cicci under arrest. On February 28, was the next time I was there, 1925, along in the afternoon between 5:30 and 6:00 o'clock in the evening; I had a search-warrant for 404½ Fifth Avenue South, which is immediately over the Monte Carlo; I went upstairs, and in going around to the various rooms I came to room 17, which had a Yale lock on it; I could smell from the hallway the odor that I am familiar with of whiskey, and the proprietor of this place had no key with which he could unlock this door. After I had been there ten minutes probably someone sent for me downstairs, and I went downstairs, and downstairs in the Monte Carlo I went in the front way, and I saw in the office standing around a large round table in this office the following persons: Councilman Hesketh, Detective Martin Cleary, and another one by the name of Samuelson or Simondson, Frank Gatt, Mrs. Gatt, I believe she was sitting down with the two children, and another man whose name I have forgotten, but whose name I have in my notes some place. There was also standing behind the bar Arinello Pepe, who was on the stand earlier; there were quite a number of people in the place, some of them standing, some sitting at the lunch-counter, on the lunch-counter stools. I came back, I saw this tray on the counter with the glasses on that have been produced in evidence, with a little liquor in each of the glasses; also this bottle that was on the tray with probably

(Testimony of W. M. Whitney.)

an ounce, or [57] half-ounce or three-quarters of liquor in it; also saw the bottle that was taken from Pepe that was introduced in the last trial; this bottle has not been in the possession of any prohibition officer since it has been introduced at the last trial; it is empty. Pepe stated he had that bottle of whiskey on his person. I immediately went in and spoke to Gatt, and spoke to Hesketh. I asked Hesketh in the presence of Gatt what he was doing down there, he said, "I came down here to have a talk with Frank Gatt about renewing his pool-room and card-room licenses; just down here investigating," and Gatt stated that that was so, also stated that that was what Hesketh was there for. I then searched the person of Frank Gatt,—or just about that time Corwin brought Pepe inside of the door and searched his person, and I saw Corwin take from the person of Pepe, from his cap this key, which Corwin immediately turned over to me; he stated, I believe, that might unlock room 17; anyway he turned it to me and I stuck it in my pocket for a minute; I then searched the person of Frank Gatt, that is where I took from one of his pockets—vest pockets the folded memorandum which is there on the desk; I don't know what the number of the exhibit is.

Exhibit 52 is the *car* that I took from in back of the bar, a little later on in one of the drawers in the back bar; that is the *car* upon which is marked Government's Exhibit 52. The other three cards of the Monte Carlo with the names on them, and

(Testimony of W. M. Whitney.)

it was attached to Government's Exhibit 52 and upon each of which there is a memorandum or writing in purple ink, which I know is written by Gatt because he said so. I took from Gatt's person this check-book.

I had told Frank Gatt when I first *when* in he was under arrest. This exhibit 44 I took from the person of Frank Gatt; had it in his pocket. This was on the night of February 28, 1925.

Government's Exhibit 46 I took from his vest pocket, folded up in the way it naturally folds up. [58]

Mr. Whitney identified Government's Exhibit 46, as a paper which he took out of Frank Gatt's vest pocket, folded up naturally, and testified that he was familiar with the premises and buildings mentioned on the exhibit as they were on February 28th, 1925.

Q. Now, Mr. Whitney, are you familiar with those premises described in that exhibit?

A. Yes, sir.

Q. Do you know what kind of premises those buildings were?

Objected to by the defendants on the ground that it is incompetent, irrelevant and immaterial. Objection overruled and an exception allowed.

A. Yes, sir.

Q. What kind were they?

Same objection by the defendants, on the same grounds.

(Testimony of W. M. Whitney.)

The Silver Dollar is a soft-drink joint at 217½ Second Avenue South; 116 Third Avenue South is a soft-drink bar and bootlegging joint. 104½ Fourth Avenue South was a soft-drink bar and bootlegging joint.

Mr. DORE.—We ask an exception to all this testimony.

The COURT.—Yes, note an exception.

That the Silver Dollar is a soft-drink joint at 217½–2d Avenue, South.

That 116–3d Ave. South is a soft-drink bar, and bootlegging joint.

That 104½–4th Ave. South was a soft-drink bar and bootlegging joint.

215–2d Ave. South at that time was a bootlegging joint and had a bar and soft-drink place similar to the Silver Dollar near it.

The South Pole was at the northwest corner of Dearborn and 6th Ave. South, a soft-drink bar and bootlegging joint.

211½–2d Ave. South was a bootlegging joint downstairs similarly fitted up as the Silver Dollar.

105 Washington Street was a bootlegging joint and soft-drink bar.

217½ Washington Street was up to a few days before the raid on the Monte Carlo a bootlegging and soft-drink joint.

104 Washington Street was a sort of soft-drink and bootlegging joint.

101 Occidental up to a few days before the raid on the Monte Carlo was a bootlegging joint and a

(Testimony of W. M. Whitney.)

soft-drink place in the basement under Joe Dizards.

On the reverse side of exhibit 46—

215–2d Ave. South was a bootlegging joint at that time. [59]

Mr. Whitney further testified that exhibit 50 was taken from the wall back of the bar on the day of the raid, February 28th, 1925.

That exhibit 47 was taken out of one of the drawers of the back bar of the Monte Carlo on February 28, 1925.

That exhibit 48 was taken by the witness from the same drawer on the same date.

That exhibit 50, 47 and 48 were introduced in evidence.

That exhibit 49 was taken by the witness off the wall of the Monte Carlo back of the bar on the day of the raid February 28, 1925, and the same was admitted in evidence.

That Government's Exhibit 54 was taken by the witness from a drawer on the back bar immediately back of the slot machine which was on the bar the day of the raid, February 28, 1925; the slot machine was one of the new models that were being placed at that time. The exhibit was admitted in evidence.

That Government's Exhibit 55 was found by the witness in one of the drawers in the back bar of the Monte Carlo on February 28, 1925, and was admitted in evidence.

(Testimony of W. M. Whitney.)

Government's Exhibit 51 was found by the witness in the same place on the same date, and was admitted in evidence.

Government's Exhibit 53 was taken from the same place by the witness at the same time, and the defendant Frank Gatt admitted that the writing on the exhibit in purple ink was in his handwriting, and the exhibit was admitted in evidence.

Exhibits 38, 39, 40, 41, and 42, and 43, were admitted in evidence over the objection of defendants on the ground that they had no bearing on the case, exception allowed. [60]

Mr. Whitney further testified that on the night of February 28, 1925, he assisted in searching the persons of Pepe and Frank Gatt; that one Hesketh and two plain clothes men were present; that he saw Agent Corwin take a key from the person of Pepe with which he went upstairs and opened up the Yale lock on room 17; that said room was not occupied; that it smelled strongly of whiskey; that he found a large secret cache in one corner in which there was found a large quantity of assorted liquors, of about 30 gallons of moonshine, 5 cases of bonded whiskey among the brands of which were Teacher's and Black and White; that after finding the liquors he came down again to the Monte Carlo, assisted in the search, found the articles heretofore identified and engaged Frank Gatt in conversation; that there was a locked safe in the office; that defendants Romeo and Pepe claimed not to have the combination but Frank Gatt

(Testimony of W. M. Whitney.)
at this time stated he had sold the Monte Carlo to Charles Romeo and Romeo Tranca on January 19, 1924, and had executed a bill of sale to the same; that he and his brother John Gatt had owned the Monte Carlo for a period of about five years previously.

Mr. Whitney further testified that he questioned the defendant Gatt quite closely regarding the ownership and operation of the Monte Carlo because a short time previously he had talked a number of times with one of the employees of Frank Gatt, a defendant named James Rossi; that the witness talked to Rossi in December, 1924, and in January, 1925, and February, 1925, and talked to him personally on a number of other occasions during those months over the telephone; that Rossi stated that he was at all those times before the raid on the Monte Carlo and was still in the employ of and working with Frank Gatt; that he went to work first for Frank and John Gatt several months prior to November, 1923, as a bartender [61] in the Monte Carlo at one hundred ten dollars per month; that he worked one of the shifts of eight hours at the Monte Carlo from the time of his employment until in the early summer of 1924, after which time he became an outside man in the selling and handling of whiskey and in helping to operate some stills for the Gatts and the Monte Carlo outfit and also became a collector for the Gatts which Rossi stated to the witness was his business at the time of these conversations. Rossi further

(Testimony of W. M. Whitney.)
told witness that while he was bartender John and Frank Gatt were the owners of the Monte Carlo and the principal ones connected with the Monte Carlo outfit; that in the Monte Carlo outfit were Louis Cicci, Frank Gatt, John Gatt, Charles Romeo, Romeo Tranca and August Bianchia; that until the summer of 1924, he sold whiskey over the bar; that they always had a bottleman or man in front of the bar whose business it was to carry the bottle; that Frank Gatt carried on his whiskey business out of the Monte Carlo and saw those he supplied with moonshine in the office of the Monte Carlo; that when he, Rossi, went to work he would find a certain amount of the money left in the cash-register; that he rang up the money in the cash-register for the sales of whiskey and that Frank Gatt at least once a day came and counted up the money and would take the money and that sometimes John Gatt would come and count up and take the money; that he would get his wages as long as he was at the Monte Carlo from either Frank or John Gatt and that he has seen August Bianchia also get his money from John or Frank Gatt. Rossi stated to witness that someone came into the Monte Carlo two or three days after Rossi had sold Mr. Whitney whiskey in November, 1925, and told Frank Gatt that it was Whitney to whom he had sold whiskey a short time before, and that Gatt got scared and told Rossi to lay off a few days on the selling; that the Gatts became worried in January, 1924, over [62] the rumor that Mr. Whit-

(Testimony of W. M. Whitney.)

ney was attempting to apprehend the Monte Carlo and on January 19, 1924, Frank Gatt made a bill of sale to Charles Romeo and Romeo Tranca; that the bill of sale stated that the price was six thousand dollars; that this was a fake bill of sale; that neither Tronca nor Romeo paid Frank Gatt anything, that they simply allowed Gatt to transfer the property to them and that at all times up into February, 1925, Frank Gatt and John Gatt were the owners of the Monte Carlo and neither Rossi, Tronca or Romeo had anything to do with the Monte Carlo as owners and that Frank Gatt continued to take the money every day after he executed the bill of sale just like he did before. That one of the reasons that Tronca and Romeo in February, 1924, executed a bill of sale of one-third interest in the Monte Carlo to Rossi was that Rossi applied for and got from the City Council of Seattle a card-room and pool-table license because only citizens could get licenses and neither Tronca nor Romeo were citizens; that Rossi did not put up any money for this alleged interest, and that in fact he, Rossi, had not any interest; that this arrangement was gone through at the request of Frank and John Gatt. That he, Rossi, executed a bill of sale for his interest over to Tronca and Romeo; that neither Tronca nor Romeo paid him anything for this. That Charles Romeo was the right-hand man of Frank Gatt, and they worked together in the whiskey business out of the Monte Carlo; that later Romeo Tronca made a bill of sale to Charles

(Testimony of W. M. Whitney.)

Romeo; that Tronca, so far as the Monte Carlo is concerned, merely held title to cover up for Frank Gatt; that later Romeo Tronca made a bill of sale to a fictitious person under the name of Tony Saraci and when Rossi talked to witness in February, 1925, they had not yet found anyone who would answer as Tony Saraci; that Rossi, Romeo, and Tronca had often talked the matter over with Frank Gatt as to [63] the covering up of the ownership; that these fake bills of sale; that he knew Gatt paid Romeo and Tronca money but he did not know exactly how much they were getting but he did know August Bianchia was getting one hundred ten dollars per month; that room 17 at the Saint Paul Rooms, 404½ Fifth Avenue South, just over the Monte Carlo was used as a *chach* and had been used for a long time and even before he, Rossi, went to work at the Monte Carlo and that it was still being used in February, 1925, and that Rossi explained to the witness just where the secret cache was in room 17, and how to open it and get into it; that if they raided the Monte Carlo and searched the bartender they would find the key on his person which would open it and get into it; that they sometimes carried 20 to 25 gallons of whiskey and several cases of bonded stuff in this cache. That Rossi told the witness in February, 1925, that he would notify the witness when the cache was filled up and said that they were about to put a large quantity of liquor in the cache and he, Rossi, would phone witness when it was

(Testimony of W. M. Whitney.)

full and that Rossi did a few days later phone him that the liquor was in the cache and he would find the key to the cache and said that Gatt often came in the evening to the office in the Monte Carlo and concluded his deals for liquor in the office. The defendant Rossi also stated to the witness that if they arrested and searched Frank Gatt they would find in his pocket papers and documents showing the places that the Gatts were doing business with the amount they paid; that defendant Rossi further stated to witness that while he was working as bartender August Bianchia was working as morning bartender, working until about four o'clock in the afternoon at which time Rossi went on shift; that Bianchia had a bottleman as well as he, Rossi. Rossi further stated to the witness that Frank Gatt was working in the Monte Carlo as a bartender up until the early part of 1923, after which time he [64] did not work very much.

At this time, 5:05 P. M. an adjournment was taken until 9:30 A. M., December 30, 1925.

Direct Examination of Mr. WHITNEY Resumed.

Mr. Whitney resumed the narrative of his conversation with Rossi and stated that Rossi had told him he was just a day or two before the raid on the Monte Carlo that he was still in the employ of Frank Gatt getting one hundred ten dollars per month and had informed witness that room 17 of the Saint Paul Rooms, 404½ Fifth Avenue South was being fitted up and well stocked with liquors and that the witness would find the cache full as he

(Testimony of W. M. Whitney.)

had told witness a few days before he would let him know when it was stocked; that this cache was merely a working cache for the Monte Carlo and a few of the smaller establishments for which the Monte Carlo furnished whiskey around there and that the cache would be full by the time we could make the raid.

Rossi further started to the witness that in December, 1924, and January, 1925, that either Frank Gatt or John Gatt would come each morning and get the money—

Mr. DORE.—We ask the jury be instructed that this testimony only goes as against the defendant Rossi, it cannot be taken to establish any fact against any other defendant.

Mr. McKINNEY.—This is a conversation I understand prior to the termination of the conspiracy.

Q. (By the COURT.) When was this conspiracy?

A. It was in the fall of 1924 or early part of January, 1925.

The COURT.—Very well, go ahead.

Mr. DORE.—I renew the request. Is the request for such an instruction denied at this time?

The COURT.—At this time.

Mr. DORE.—Note an exception. [65]

The COURT.—I will state that unless the conspiracy is established between these parties, of which Rossi is a part, then the statement made by Rossi could not be construed against any of the other defendants except himself, nor can the statement itself be construed, as establishing conspiracy

(Testimony of W. M. Whitney.)

as against the other parties, but only bind Mr. Rossi, and if a statement was made in furtherance of the conspiracy, and the conspiracy is established, then it may be construed as against all the parties.

WITNESS.—(Continued.) Mr. Rossi also stated that in 1925, a few days before the raid he was working under the direction of the Gatts and Frank Gatt in particular and was collecting from other bootlegging establishments which Frank Gatt and John Gatt operated out of the Monte Carlo and was furnishing liquor and collecting thousands of dollars a month, as high as twelve thousand dollars a month, and turned it over to Frank Gatt as protection and graft money from these institutions and brought it up to the office and turned it over to Frank Gatt in the office of the Monte Carlo.

Mr. DORE.—I move that testimony be stricken and the jury instructed to disregard it as incompetent, irrelevant and immaterial.

The COURT.—With relation to the collection of the graft money, that may be stricken. Proceed.

Mr. DORE.—Note an exception.

The COURT.—Note it.

The witness resuming stated that in 1925 and before the raid in 1925, Rossi explained that he and the Gatts and Charles Romeo had talked it over several times to know what to do because they had executed a bill of sale to a fellow named Tony Saraci; that there was no Tony Saraci and that they got that name in the bill of sale and that they were in a hell of a fix, to use Rossi's expression, and

(Testimony of W. M. Whitney.)

didn't know how to get title out of that name because everybody was afraid to come up and sign a paper that his name was Tony Saraci and that that was the situation the last time witness talked with Rossi.

On the night of the raid I had a conversation with Frank Gatt. Knowing these things that I have stated I questioned [66] Gatt regarding his ownership, and he stated to me that he had sold this to Charley Romeo and Romeo Tronca on December 19th, 1924, and that he was not the owner. I then said, "Well, did you own it all the time for several years past up to the time you claim you sold it out?" "Yes," he said. I said, "Did you own this place in March,—this Monte Carlo in March, 1924, or 1923," he said he did; and I asked him if he received all the *proofs,* took in all the money and was responsible for the bills and paid the bills, and got the money that was in the cash-register up to the time he sold it, which was in January, 1924, he said that he did. I asked him if Lew Cicci was working for him in December, 1924, before he sold out, and he said yes, Cicci was working for him, one of his employees, had worked on the floor, as he expressed it. Then I asked him if he had employed,—if Jim Rossi had worked for him up to the time that he sold the place out, and Gatt stated that Rossi was one of his employees, was a bartender there behind the bar, and had worked for him during these times. I asked him if the morning man Bianchi had been an employee of his, and he said, "Yes,"

(Testimony of W. M. Whitney.)

that he employed all the men that worked in the Monte Carlo, he owned it and had rented the barber-shop and the lunch-counter up to that time that he had sold the place,—claimed to have sold the place. Then I had some conversation with him when we were doing the searching.

I said, "Gatt, we would take that bar apart," and he said, "I wish you wouldn't do that; what is the use of doing that; I am a good fellow, and you are a good fellow, no use of doing that"; I said, "What interest have you got in this; if you don't own the bar what do you care whether I take that bar apart, or whether I don't?" He said, "It cost me a lot of money to get another bar. [67] It is a good bar, I wish you would not do that; you have got the stuff what is the use of doing anything further." And during the process of taking that apart he asked me two or three times, spoke to me two or three times about it; and I suggested I guess I would have to look behind the mirror, he said, "Don't do that." No one else there raised any objection, neither Pepe nor Charley Romeo nor anyone else made any remonstrance at all; each of them said it was not theirs' they didn't care what we did.

Gatt opened the cash-register, pulled the drawer out underneath the cash-register and took a pouch or sack, and counted the money carefully and stacked it up and counted it and put some of this money, I don't know whether he put it all in one

(Testimony of W. M. Whitney.)

of the sacks, I saw him take it, make a memorandum and put in the safe and lock the safe.

He put it in the small office safe.

Exhibit 32 is one of the six gallons of moonshine in gallon jugs that was taken from the cache in room 17 in the St. Paul Rooms, on February 28, 1926.

Exhibit 20 is a bottle of whiskey I saw Mr. Kline have that was taken at the Monte Carlo when Cicci was arrested on Dec. *26*, 1923.

Exhibit 8 is one of the ten quarts in bottles like this that were found in the cache in room 17 on the 28th day of February, 1925.

Exhibit 1, nine quarts of brandy in room 17 on the 28th day of Feb., 1925.

Exhibit 5, there were twenty-one quarts of Black and White in two cases taken from room 17 on the 28th of Feb., 1926.

Exhibit 19 is a quart of white moonshine that was poured from one of the three five-gallon kegs that was in the case in room 17 on the 28th of February, 1925.

Exhibit 3 is one of the eight or nine quarts, I have forgotten which without referring to my notes, of John Dewar's Special liquor [68] found in the cache in room 17 on this February 28th, 1925, the night of the raid.

Exhibit 17 is one of the twenty-one quarts of Perfection Scotch whiskey found in room 17 in the cache.

(Testimony of W. M. Whitney.)

Exhibit 2 is one of two quarts of John Dewar's found in the cache in room 17.

Exhibit 9 is, I believe, one of the two bottles of creme de menthe that was found in the cache; this is a cordial liquor; it contains more than one-half of one per cent and fit for beverage purposes.

Exhibit 6 is one of a half case of gin that was found in room 17 on Februery 28th, 1925.

Exhibit 18 is one of twelve pints of colored moonshine found in room 17, February 28th, 1925.

Exhibit 13 is one of eighteen pints of white distilled spirits or moonshine found in room 17, in the cache, on February 28th, 1925.

Exhibit 14 is one of eighteen half pints of colored moonshine found in the cache *to* room 17 on February 28th, 1925; that is one of them.

Exhibit 30, is the same as above.

Exhibit 21 is one of the full pints of white moonshine taken from same room and cache.

Exhibit 24 is one of the half pints of white moonshine taken from room 17 on February 28, 1925.

Exhibit 12, taken from cache in room 17, half pint of white moonshine.

Exhibit 22 one of the pints of white moonshine; same answer applies as to Exhibit No. 21. [69]

Exhibit No. 4 is a bottle of Black and White that I saw standing by or on the tray in the office when I first went into the Monte Carlo, when Mr. Hesketh and the others were there.

Exhibit No. 15 is a bottle that was standing by the tray on the counter on the evening of the 28th

(Testimony of W. M. Whitney.)

of February, 1925, at the Monte Carlo when Mr. Corwin called me down; at that time it was full of whiskey, and was not broken, and I saw it and identified it at the last trial, when it was admitted in evidence.

Exhibit No. 25 is a bottle that was turned to me by Agents McCrory and Lambert on or about May 29th, 1924, and held by me for a short time and then turned over to Agent Kline, the custodian.

Exhibit No. 23 is the same as above, it was about May 26th that I received it, 1924, and I had it a short time, and turned it to Mr. Kline.

Exhibit No. 27 is the bottle I purchased on the 25th of November, 1923, for $3.00; I kept it in my locker until in the summer of 1924, I believe, and I turned it over to Mr. Kline with some of the others.

Exhibit No. 29 is a bottle that was brought to me by McCrory and Carruthers about January 8th; they marked it in my presence, and I kept it for some time and turned it to Agent Kline.

Exhibit No. 11 is the liquor that was poured out of the glasses—remaining in the glasses at the time of the raid at the Monte Carlo.

These exhibits here they were brought up; Mr. Kline was down at the time of the raid himself and helped gather them, and I helped him gather them, and he took charge of them, brought them up to the vault,—bring them first to the Prohibition Office and there we marked them; I marked most of the labels myself,—Mr. Corwin and I in Mr. Kline's

(Testimony of W. M. Whitney.)

presence, and he took charge of [70] them, and kept them in the vault until the last trial, until they were introduced in evidence, they have been in the possession of the prohibition office; since then they have been in the possession of these court officers.

(Trs. 101, line 4 to Trs. 107, line 4.)

Rec'd copy, Oct. 8, 1926.

JOHN F. DORE,
Atty. for Defts. [71]

Cross-examination.

I had a conversation with Rossi in September, 1924. This conversation took place at Sixth or Seventh Avenue and Jackson Street. He went out driving with me in my automobile. He was not under arrest, he was simply riding with me in my automobile. I met him by prearrangement, for the purpose of having a conversation with him. I talked with him in December over the telephone. He told me then over the telephone that he collected police graft and sheriff's graft. He told me that Frank Gatt was the king of the grafters and was getting rich; that he didn't like it and that lots of the Italians didn't like it, and for that reason he told me the story. He told me he was telling me the story because he wanted to help me catch Frank Gatt. He told me he was collecting for Gatt about $12,000 a month. He said Gatt was paying him $110 a month for this collection. He arranged to call me up on the telephone and tell me what was going on. He called me before this raid.

TESTIMONY OF T. P. RAGSDALE, FOR THE GOVERNMENT.

T. P. RAGSDALE, a witness produced on behalf of the Government, being duly sworn, testified as follows:

I bought two drinks of moonshine from Jimmie Rossi at the Monte Carlo, on May 12, 1924, and the same amount from Rossi on May 14, 1924.

Government's Exhibit 46 received in evidence.

Government's Exhibits 1 to 35 admitted in evidence.

Government rests. [72]

TESTIMONY OF ROMEO TRONCA, FOR THE DEFENDANTS.

ROMEO TRONCA, one of the defendants, being duly sworn, testified as follows:

Direct Examination.

I acquired an interest in the Monte Carlo on January 19, 1924, from Frank Gatt. I paid $3,000 for a half interest in the place. Romeo was my partner. We couldn't get a license, so Rossi gave *is* $2,000 for a third interest, saying he could get a license, but he couldn't get a license. Then I sold the place for $1,500 and lost $500 on the deal. That was April 5th. I never was in the business with Frank Gatt or John Gatt, or anybody else. I left Seattle July 10th in the morning, to go to Spirit Lake, where I have an interest in a mine. July

(Testimony of Romeo Tronca.)

11th, when the agents say I was at the Monte Carlo, I was at Spirit Lake, with Mr. Horton and Mr. Jahn. I was there *u;* until after the 15th of July. On the morning of September 22, 1924, I left Spirit Lake and got back to Seattle on the night of September 23d, after dark.

Cross-examination.

Q. Isn't it a fact that this partnership among you men existed for the purpose of distilling moonshine?

Defendants objected on the ground that it is incompetent, irrelevant and immaterial. Objection overruled and an exception noted.

Q. And you had your headquarters at the Monte Carlo?

Same objection, same grounds.

A. Not me.

TESTIMONY OF W. K. GRISSON, FOR DEFENDANTS. [73]

W. K. GRISSON, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination.

I was with Romeo Tronca, at Spirit Lake, September 22, 1924.

TESTIMONY OF C. W. JAHN, FOR DEFENDANTS.

C. W. JAHN, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination.

I was with Romeo Tronca, at Spirit Lake, July 11, 1924. I was with him from July 8th. I was with him on the morning of September 22d, at Spirit Lake, until the night of the 23d of September, when we arrived in Seattle.

TESTIMONY OF HOWARD HORTON, FOR DEFENDANTS.

HOWARD HORTON, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination.

I was with Romeo Tronca, at Spirit Lake, July 11, 1924, and also on September 22, 1924.

TESTIMONY OF W. M. WHITNEY, FOR DEFENDANTS (RECALLED — CROSS-EXAMINATION).

W. M. WHITNEY, a witness recalled by the defendants, testified as follows:

Cross-examination.

As I explained this morning, I had talked with James Rossi and he had told me about this situa-

(Testimony of W. M. Whitney.)

tion, and he suggested himself that I,—any charge I filed I include his name in it, and this was filed with his knowledge, he was to be charged, so that Gatt would not suspect he had talked to me. [74]

TESTIMONY OF CHARLES ROMEO, FOR DEFENDANTS.

CHARLES ROMEO, one of the defendants, being duly sworn, testified as follows:

Direct Examination.

Admitted that he had owned the Monte Carlo at one time, but not with Frank or with John Gatt. Denied he had ever sold any liquor there or knew that any was kept there, or that he had ever engaged in any of the acts or things charged in the indictment.

TESTIMONY OF FRANK GATT, FOR DEFENDANTS.

FRANK GATT, one of the defendants, being duly sworn, testified as follows:

Direct Examination.

I owned the Monte Carlo until January, 1924, when I sold it to Rossi and Tronca. I have had no interest in it since. At the time I owned it I was the sole owner. Pepe never was at my house and never had the conversation he testified to. No liquor was ever sold at the Monte Carlo or kept there with my knowledge.

(Testimony of Frank Gatt.)

Cross-examination.

Q. You were convicted—you and Cicci were convicted of the possession of intoxicating liquor out of that place in 1923?

Defendants object on the ground that it is incompetent, irrelevant and immaterial. Objection sustained and the jury instructed to disregard it.

TESTIMONY OF MRS. FRANK GATT, FOR DEFENDANTS.

Mrs. FRANK GATT, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination. [75]

(By Mr. DORE.)

Q. What is your name? A. Mrs. Frank Gatt.

Q. What relation are you to the defendant, Frank Gatt? A. His wife.

Q. I will ask you, Mrs. Gatt, where you live; where the family home is?

Mr. McKINNEY.—We object to any testimony from this woman on the ground that she is the wife of the defendant.

The COURT.—If an objection is made on that ground the objection is sustained.

Mr. DORE.—Note an exception. Does your Honor hold she won't be allowed to testify at all?

Mr. McKINNEY.—Not on behalf of her husband.

The COURT.—You say you offer her in behalf of the other defendants?

Mr. DORE.—I am offering her as a witness.

The COURT.—She can testify in behalf of any of the other defendants; if you offer her as a witness for any of the other defendants, except her husband, she will be permitted to testify; but she cannot testify in behalf of her husband over the objection of the Government.

Mr. DORE.—Note an exception; that is all, Mrs. Gatt. [76]

Defendants rest.

During the opening argument by C. T. McKinney, Assistant United States Attorney, the following occurred:

Mr. McKINNEY.— * * * "I will say to this jury if you want to rid this city of one of its most corrupt influences, and you find that the evidence so warrants in this case, you will have done the city one of the best services in years."

Mr. DORE.—I ask the jury be instructed to disregard that as improper argument.

The COURT.—The jury will disregard the conclusion.

During the closing argument by T. P. Revelle, United States Attorney, the following occurred:

Mr. REVELLE.—"When you find a crowd of men like these men in your city, some of them not naturalized, according to the testimony, when you find them together,—

Mr. DORE.—I object to that as improper argument, and ask the jury to be instructed to disregard it.

The COURT.—The jury will conclude upon the evidence, not conjecture. [77]

Mr. REVELLE.— * * * "These defendants are charged with conspiracy, they have taken the stand in their own behalf, three of them, and we tried to examine them on certain things connected with that place; we tried to show you that this place was raided and Frank Gatt came and pleaded guilty, and the Court would not let us do it,—

Mr. DORE.—I object to that as improper argument, and ask the jury be instructed to disregard it; absolutely improper.

The COURT.—You will conclude upon the evidence.

Mr. DORE.—I am asking for a definite instruction on that remark.

The COURT.—And the remark is withdrawn by counsel and the jury will disregard it.

Mr. REVELLE.— * * * "We tried to bring out all the other facts so that you might have the whole story; Mr. Dore objected I suppose feeling he was protecting the rights of his clients,—

Mr. DORE.—I object to that as improper argument to the jury, and ask they be instructed to disregard that statement.

The COURT.—The jury will disregard that statement.

Mr. REVELLE.—Let us see if I will have to take this back,—

Mr. DORE.—I object to that remark of counsel and ask the jury be instructed to disregard the remark.

The COURT.—Yes, proceed.

Mr. REVELLE.—Gentlemen, it is getting so I am afraid I will not be able to talk at all. Each one took the stand and they were supposed to tell you the whole truth,—

Mr. DORE.—I obect to that as an improper remark, and ask the jury to disregard it.

The COURT.—Overruled. [78]

INSTRUCTIONS OF COURT TO THE JURY.

The COURT.—Gentlemen of the Jury: The indictment is in one count; it charges the defendants with conspiracy entered into on or about the 1st day of March, 1923, and continuing to the time of the filing of the indictment, which was on the 26th day of March, 1925, to violate the National Prohibition Act; that is to knowingly possess and sell intoxicating liquor containing the prohibited alcoholic content, as provided by the Volstead Act, at 404 Fifth Avenue South in the city of Seattle. And likewise to maintain a common nuisance at that place by keeping for sale in that place the property which I have mentioned to you, intoxicating liquors. The liquors that they conspired to possess and sell it is charged were whiskey, distilled spirits and other liquors, and then charges the commission of certain overt acts by the defendants to carry forward the conspiracy. All the acts are set out in the indictment, what they are and when they are done and by whom. The indictment

will be sent to the jury-room; it is not evidence, it is merely the paper charge; the only function of the indictment is to bring the defendants before the Court to answer the charge, and while it is sent out for your information as to what the charge is, it is not evidence, and not to be considered by you as evidence.

You are instructed that it is against the law for persons to conspire or agree together to violate a law of the United States, and then for one of the parties to do some act to carry forward that conspiracy. A conspiracy may be defined as a combination of two or more persons by concerted action to accomplish an agreement or unlawful purpose; the act [79] itself is the essence of the charge; and while the combination of two or more persons must be shown, this need not be done by testimony showing that two or more persons met together and entered into a formal arrangement, either oral or in writing, for the unlawful purpose, or by stating the general extent and detail of the plan, or means by which it is to be made effective; it is sufficient if two or more persons in any manner positively or tacitly come to a mutual understanding to accomplish an unlawful purpose. Where an unlawful object is sought to be effected and two or more persons actuated by a common purpose to accomplish that object work together in any way in furtherance of the unlawful scheme, designedly, every one of such persons becomes a party to the conspiracy, although the part he is to take may be a subordinate one; nor is it mate-

rial how the profits or the money is to be divided that is to be made out of the conspiracy, if any, or whether any profits are to be made; a conspiracy might be formed to violate a law of the United States without any profit whatever. One person may make all the profits, so far as that is concerned, and the others would be just as liable to the charge if they actually knowingly entered into an unlawful enterprise; and anyone who after a conspiracy is formed, and who knows of its existence consciously joins therein becomes as much a party thereto from that time as though he had originally conspired. And, furthermore, where several parties have conspired together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerned plan with reference to the common object, and in furtherance thereof, is, in the contemplation of law, the act of the parties, and proof of such acts against one of the [80] parties who engage in the same conspiracy.

In this case one of the defendants, Zrinello Pepe, pleaded guilty. You are not concerned with his guilt in this case except as it may bear upon the relation with either one of the other defendants. Merely because he pleaded guilty would not carry any presumption to your minds that the other defendants, or any of them, are guilty because they are charged in the same indictment; and the defendants are entitled to have their relation to the charge determined upon the evidence which is presented against each of them in this case.

When a conspiracy is established then any statement made by one of the defendants to the conspiracy during the pendency of the unlawful enterprise, in furtherance of the conspiracy, is not only evidence against himself, but is evidence against the other defendants, but when the combination is proved they are as much responsi*bility* for such declaration and the acts and objects to which they relate as if made or committed by themselves. A statement by one party, however, may not be considered as proof in establishing conspiracy, unless the statement was made in the presence of such other parties to the conspiracy, nor considered against a party to the conspiracy out of whose presence it was made. Such a statement would only be a statement against the party himself, but after the conspiracy is established as having been formed, to your satisfaction beyond a reasonable doubt, then a statement made during the pendency of the conspiracy, and in furtherance thereof, may be considered against every other person who consciously joins the conspiracy. If you are convinced by the evidence in this case beyond a reasonable doubt that any or all of the defendants did enter the conspiracy [81] as charged in this indictment, or thereafter the conspiracy was formed others of the defendants joined knowingly and consciously, as herein stated, then a statement made by one of the defendants to the conspiracy after the conspiracy is established by a degree of proof which I have indicated to your minds made by either of the defendants in furtherance thereof,

then it could be considered as against all of the parties to the same conspiracy as it existed at the time that the statement was made. A mere recitation of the acts done by one defendant with relation to the other acts, and which statement was not made in furtherance of the conspiracy, could only be considered as evidence against the party making it.

Each of the defendants in this case, except Pepe, who has pleaded guilty, has entered a plea of not guilty; that means they deny the charges; they are presumed innocent until they are proven guilty beyond every reasonable doubt. And this presumption continues with them throughout the trial and until you are convinced by the evidence that they are guilty by that degree of proof. In determining whether they are guilty of the conspiracy as charged, you will take into consideration all the evidence that has been presented, duly weigh it, duly consider it, analyze it and determine whether it establishes the guilt of the crime charged; and if you believe from the testimony that a conspiracy was formed by one or more of the defendants, or by one of the defendants, and the others disclosed by the evidence, and that consummation of the overt acts was done by one of the conspirators charged during the pendency of the unlawful enterprise, in furtherance thereof, then you will find such defendant whom you find to have conspired or after the formation of such conspiracy knowingly joined, guilty as charged. If you have a reasonable doubt as to any one of the defendants you

will return a verdict of not guilty against such defendant.

Evidence is of two kinds, direct or positive, and circumstantial. Direct and positive testimony is produced by a witness testifying directly of his own knowledge of the [82] facts to be proven; and circumstantial evidence is proof of facts and circumstances in a case from which a juror may infer other and connected facts which usually and reasonably follow, according to the common experience of mankind. Circumstantial evidence is legal and competent in a criminal case when it is of such a character as to exclude every reasonable hypothesis other than the defendants are guilty, and when it is of that character it is entitled to the same weight as direct evidence. Circumstantial evidence in any case should be considered by you in connection with the other evidence before you, but the circumstances must be consistent with each other, consistent with the guilt of the parties charged, inconsistent with their innocence, and inconsistent with every other reasonable hypothesis except that of guilt.

You are instructed, however, that the mere presence of any one of the defendants at the premises known as 404 Fifth Avenue South, the place named in the indictment, in Seattle, would not of itself make them guilty of conspiracy, nor would the fact that title to the property was standing in any particular party's name, make the party guilty of conspiracy, nor would the fact that a person sold intoxicating liquor, or had the possession of intoxi-

cating liquor, that fact alone would not establish conspiracy; that would be a violation of the National Prohibition Act, but it would not of itself establish conspiracy; but while the act of possession and sale would be a violation of law, it would not of itself, as stated, be conspiracy; and if you find possession was had and sale was made by one of the parties, the act of possession and sale should be considered by you with other acts disclosed by the evidence tending to show an understanding, a co-operation or an arrangement, if any, to carry forward the unlawful enterprise as charged in the indictment, of possessing or selling distilled spirits or having distilled spirits at the place named in the indictment for the purpose [83] of sale.

The gist of this action, as I have stated, is conspiracy to sell liquor as set out in the indictment, at 404 Fifth Avenue South, Seattle. Much has been said during the trial of this case as to ownership of the liquor and the bar in the soft-drink place, and other paraphernalia used in this bar. The ownership of the property is not decisive of this issue. Some of the defendants, or all, may be guilty of the conspiracy charged and not have any property interest in any of the fixtures, or in the leasehold. The ownership of property, the status of the title, is an element to be taken into consideration as to whether the conspiracy was formed, if a conspiracy was formed, and who participated therein.

Much likewise has been said with relation to the witness Pepe, who pleaded guilty, and testified to

the fact that he was employed in this place by the defendant Frank Gatt as a bottleman, and then as a bartender; that he made sales of intoxicating liquor as bartender. As a bottleman he would carry the bottle to the one acting as bartender to make sales,—deliver the bottle until the customer was served, and then take it back and put it in his pocket until again demanded; and testified to you where the liquor was stored; that he carried the only key to the room; also testified that Gatt delivered to him a certain bill of sale who he said told Pepe that his name was now Tony Seracca; that Gatt told him that that was now his name, and stated that he at no time had any interest in the property, never had any money to buy the same, and never did buy it.

Criticism has also been made in the argument with relation to the testimony of Whitney in relating before you [84] conversations had with the defendant Rossi. You are instructed that where a party pleads guilty or admits the acts charged, you will take into consideration his testimony with relation to all the defendants to him, and every fact and element which has been disclosed here,—every circumstance which shows interest in the conduct and verity of his story. One of the things for you to determine is, did the defendant Frank Gatt,—and I am referring to him because his name was more frequently mentioned in argument and likewise at the trial,—use these other defendants as agencies through which the sale of intoxicating liquor could be directed? Was the transfer of the

title to the several owners in good faith? If the transfer was in good faith did Frank Gatt and some of the other defendants, and persons disclosed by the evidence, form a conspiracy during the time that Frank Gatt owned the property confessedly, and did the conspiracy continue throughout until the time of the raid disclosed by the testimony, in February, 1925 In determining whether he did, or not, you will take into consideration his business, his relation to this place, his activities about the place, the relation he bore to the other parties who were in the place, and all and every element which you feel bears upon the fact as to whether he did have anything to do with it, whether he was the active agent. If you believe beyond a reasonable doubt that he was, and that he is the man who was operating behind these other defendants, or some of them, or with other parties disclosed by the evidence, then he would be guilty whether the title to the property stood in his name, or not.

Is any credence to be placed in the testimony of Pepe, or the statements made by Rossi to Whitney, as disclosed by Mr. Whitney. Pepe says that a conspiracy was formed. Whitney said what Rossi told him with relation to the activities of the defendant Frank Gatt. From the statements of both of these parties they were parties to the conspiracy. Pepe said what Gatt did, that he acted under the direction and supervision of Gatt; that the holding of the bill of sale which was executed in January, 1925, was without his knowledge, [85] he

knew nothing about it,—it was given to him by Frank Gatt and that Gatt told him what his name was to be henceforth; and you heard his testimony with relation to statements made to him by Frank Gatt with relation to the conduct of the parties. Now, you are instructed that Pepe's testimony, likewise the statement of Mr. Rossi under the law are denominated accomplices, and the testimony of an accomplice is from a polluted source. Now, the testimony of an accomplice should be received with care and caution and subjected to careful scrutiny in the light of all of the other evidence in the case; and the jury ought not to convict upon the testimony of an accomplice alone unless after a careful examination of such testimony the jurors are satisfied beyond a reasonable doubt of its truth and that they can safely rely upon it.

In this case there is other testimony tending to show acts of certain of the parties covering the times charged in the indictment, and these acts of the several defendants should be considered in the light of all the testimony presented, and the testimony of the accomplice given the weight you feel it is entitled to in the light of all the other evidence and testimony which has been produced before you; and if you find from the evidence in this case that any witness has wilfully testified falsely concerning any material fact in the case you will have the right to disregard the testimony of such witness entirely, except in so far as it may be corroborated by other credible evidence or circumstances detailed and developed upon the trial of the case.

The defendant Bianchi did not take the stand and testify, that was his right, and because he did not take the stand and testify you should not infer from that fact that he is guilty of the crime charged, but should find from the evidence that has been presented here whether he is guilty, not from the fact he did not take the stand. [86]

The defendant Tronca has presented testimony tending to show that he was out of the city of Seattle, during a part of July,—I think the forepart of July,—July 10th or along there; you will remember the testimony, and was likewise out a short period of time prior to and including the 22d day of September; those are the dates upon which testimony has been presented he was present at this place at 404 Fifth Avenue South, in question. Now, of course, he could not be at both places at once. He testified he returned to the city of Seattle on the 22d of September about 7:15 or just after twilight; and you heard the testimony of the witnesses on the part of the Government at the time,—giving the time when they said they were in there and saw him there. You will determine, therefore, from the evidence what the fact is, if he was out of the city, then the witnesses on the part of the Government are mistaken as to the time when he was there, and there is no other testimony with relation to the particular time. They have fixed the time specifically, so you will have to determine whether he was in the city, or out of the city on that date. If you find from the evidence that it is material that would be material only as a circum-

stance to show whether he was in the conspiracy. If you believe from all the evidence presented that he had joined the conspiracy at that time, you are instructed that his presence or absence on the 22d day of September, or in July, would not be material, if you find a conspiracy was formed, and one of the acts charged in the indictment was done by one of the parties defendant in furtherance of the conspiracy. If he has shown,—if the testimony that he was out of the city raises in your mind a reasonable doubt as to whether he was a member of the conspiracy, if you find that a conspiracy was formed, then the doubt should be resolved in his favor. [87]

Something was said in argument with relation to certain expressions given current by the Chief Justice of the Supreme Court of the United States of a convention of Circuit Judges, of which he was the chairman, of a suggestion to the Department of Justice that in conspiracy cases, or in National Prohibition cases, that they thought it advisable that conspiracy charges be not lodged against violators of the law unless the offense rises to the dignity contemplated within the conspiracy statute. Now, that suggestion was merely advisory; it is not the law. The Congress fixes the law. The conspiracy statute was not amended by the Congress, and the National Prohibition Act comes within the purview and meaning of the conspiracy law as much as any other law, and the Department of Justice,—when I refer to the Department of Justice I refer to the Attorney General of the United States Dis-

trict attorneys in the several districts,—they are the persons to present the matters to the grand jury, and when a grand jury feels that testimony is presented that rises to the dignity of a charge under the conspiracy statute, then courts and juries,—when I say "courts" I mean *nisi prius* court,—may not wave aside laws and say that they should not be enforced. When a conspiracy charge is made and indictment returned by the grand jury then this court and jury,—and the jury is a part of the court,—must give the charge serious consideration, aside from the suggestion of the convention of Judges, and we cannot be controlled by that. We are simply controlled by the law. And so in this case, the charges here is that a conspiracy was entered into to sell, possess and to maintain a nuisance contrary to this law. Now, when there is testimony that a nuisance is in contemplation, that is one of the elements for your consideration, whether that was comprehended within the conspiracy, if a conspiracy is established. [88]

You, Gentlemen of the Jury, are the sole judges of the facts, and you must determine what the facts are from the evidence which has been presented. You are likewise the sole judges of the credibility of the witnesses who have testified before you. If I have referred to any fact in the case, or given you any impression or opinion as to what I believe the facts are in this case I want you to disregard it, because that is your function, and not mine. If I have conveyed any such impression to you it has simply been done for the purpose of explaining the

law that has application to the facts. Now in determining the weight or the credit you desire to attach to the testimony of a witness you will take into consideration the reasonableness of the story, the opportunity of the witness for knowing the things about which they have testified, the interest of lack of interest in the result of this trial, and from all of the circumstances and the testimony determine in this case where the truth lies.

The Government has presented prohibition agents, whose duty it is to ferret out places in which they believe the law is being violated, and their duty then is to present it to the Court; they are paid a compensation,—regular compensation, not predicated upon convictions; they get paid whether there is any conviction or not; but their duty is to state to the Court just what they found, tell you what they saw and heard; that is what they do. Did their story sound reasonable? Are the facts which they relate here corroborated by admitted facts or other circumstances here such as to carry conviction to your minds that they have told you the truth; if it is not then you must lay it aside, merely because they are agents for the Government you must weigh their evidence by the same rule as you would the testimony of any other witness. Did they appear in their testimony as though they were falsely testifying for the purpose of fastening a crime upon innocent men, because if they swore falsely they knew these defendants were innocent,—if they knowingly swore falsely. Now then, is there any indication that they wilfully perjured themselves or

were honestly mistaken with relation to any fact disclosed. Now the defendants of course are interested, because if they are convicted they must be punished. [89] Now, does their story,—the story of the defendants sound reasonable. Did they in this case present such a relation of conditions and circumstances before you, irrespective of the truth, for the purpose of raising a reasonable doubt in your minds in this case? Did their testimony ring true? What was the defendant Gatt doing in this place after he says he transferred it to Pepe? Was his explanation convincing, sufficient to raise a reasonable doubt? What was he doing in this room with the other witnesses who testified to-day, and who the witnesses on the part of the Government swore they saw at the table seated around, persons whom they named, and glasses and a bottle of whiskey? What was he doing there, and how did he come there; what was the purpose? It is admitted, I believe, at least by one of the witnesses for the Government, that they believed they had these glasses there, but did not see any bottle, except one of the witnesses said he did see a bottle but it was wrapped up in tissue paper, and he was asked to sign or initial the bottle by one of the agents, and he declined to do it; you heard him say that, and he asked the witness to sign his name in a book, which the witness did, Mr. Corwin. Now, how do these stories and this testimony impress you? Was the relation of Frank Gatt with the other defendants in this place by reason of the friendship and intimacy which has been disclosed here, and all of the

established facts as you believe them to be, established or conceded, corroborative of Pepe's testimony? Did Pepe impress you as a man who told the truth; was he fair and frank; did he impress you as a man who had invested that amount of money in this place, or who had received the amount of money that some documents show he did receive, and he stated that he signed those papers at the request of some of the other defendants, I believe Mr. Gatt, but you will take his testimony. Did it impress you he was telling the truth, if it did then give it the consideration it is entitled to. If his testimony is strengthened by the other established facts and circumstances, give it consideration. Did the exhibits that were taken from the person of Mr. Frank [90] Gatt, did they show any corroboration of the witness Pepe's testimony as disclosed upon the witness-stand, or the testimony of Mr. Whitney as given here. Try this case fairly; give the defendants a square deal; they are entitled to it; the Government is entitled to a square deal; the Government does not want *this men* convicted unless you are convinced beyond a reasonable doubt that they are guilty, and if you are convinced beyond a reasonable doubt that they are guilty then it will be your duty to return a verdict of guilty against such defendants as you believe to be guilty beyond a reasonable doubt. This is a Government of law and not of men; the law is made by the Congress; neither you nor I have anything to do with the policy of the law; we are simply here, you to find the fact and I as Presiding Judge

to tell you what the law is, and then if the parties are found guilty to fix the penalty between the maximum and the minimum; with the penalty you have nothing to do. If courts do not function properly, and you do not find the facts as shown beyond a reasonable doubt, or apply the law as the Congress provides, you encourage law violators, and it would only be a short time until a condition of anarchy would obtain in this country, and property, life and liberty would ultimately be destroyed. Try this case fairly without any prejudice, and give the defendants a square deal, as I stated a moment ago, and the Government a square deal; if you have a reasonable doubt resolve it in favor of the defendants.

A reasonable doubt is just such a doubt as the term implies, a doubt for which you can give a reason; it must not arise from a merciful indisposition or a kindly or sympathetic feeling, or a desire to avoid performing a possible disagreeable duty. It must be a substantial doubt such as an honest, sensible, fair-minded person with reason might entertain consistently with a conscientious desire to ascertain the truth and to perform a duty. A juror is satisfied beyond a reasonable doubt if from a fair and candid consideration of the entire evidence he has an abiding conviction of the truth of the charge. It is such a doubt as a man of ordinary prudence, sensibility and decision in determining an issue of [91] like concern to himself as that before the jury to the defendant would make him pause or hesitate in arriving at his conclusion, a

doubt which is created by the want of evidence, or may be by the evidence itself; a juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged.

You will take into consideration all the exhibits which have been presented. I will not send the liquor out, because there is no dispute about that; I will send out all the other exhibits. You will take all of the exhibits into consideration together with all the other testimony which has been presented. I will ask the attorneys to check up on the exhibits which have been offered and admitted by the Court so that there may be no question as to their identity.

I think I want to say something else, I mentioned that upon the trial of the other case. Reference was made to it in argument likewise upon both sides in the testimony. This bill of sale that was marked executed on January 8th, 1925, signed by Charles Romeo to Tony Saracca, bears on the back an endorsement "Filed for record at the request of Theresa DeCaro, 1340 Rainier Avenue," number something there, that is blurred. In view of the testimony here Theresa DeCaro could give the Court and jury some information as to who requested the filing of this. Pepe said he knew nothing about it until afterwards. I *call* attention to this at the other trial, and you are not concerned with the other trial, so both sides knew and at that time some suggestion was made, that one of the defendants did not know about this endorsement upon the bill of sale; I asked the Clerk after the case was closed to hand me the record and no subpoena had been is-

sued for this party. Now, this party could have given us some information, and given you some information as to who had recorded this. If it was Pepe and she had it recorded on his behalf, she could have told that and that would have settled the proposition. Irrespective of Pepe's testimony her connection with that likewise could have carried convincing proof. Now, it is a rule of law [92] that when any person knows anything of a fact with relation to an issue before the Court, and such party is not produced by the party who should produce the witness, then the Court and the jury may assume that the witness who was not called, if he could be called, would testify more strongly against the party whose duty it was to call him. Now in this case it is not for me to say upon whom the duty rested in this case, and I simply mention that to you as a rule of law, in view of the endorsement upon this exhibit, which is before you, and the fact that no subpoena has been issued of which the Court takes judicial notice.

It will require your entire number to agree upon a verdict, and when you have agreed you will cause it to be signed by your foreman, whom you will elect immediately upon retiring to the jury-room. The verdict is in the usual form, before the word "guilty" is a blank, you will write in there "is" or "not" with relation to each defendant just as you may conclude upon, and then cause it to be signed by your foreman, whom you will elect immediately upon retiring to the jury-room. And in this connection I want to say, that since you have been kept

together since the beginning of this trial I carried it over to this time so that you may be given this without any more inconvenience to you than necessary, and if you agree upon a verdict before midnight it is agreed by the defendants and the Government that a sealed verdict may be brought in; that is, when you have concluded upon your verdict have it signed by your foreman, and the foreman then will fold it up and put it in an envelope and seal it up, and you may all come here at ten o'clock to-morrow morning. If you don't agree by twelve o'clock I will have the marshal or the bailiffs put you to bed, and you can sleep until morning, if you so desire, and you will get your sleep until,—I get up at six o'clock, you ought to get up at six o'clock, go out and get your breakfast and bring you back to the jury-room. [93]

Are there any exceptions?

Mr. DORE.—Note an exception to the last instruction which contained a reference to the DeCaro woman, on the ground it is irregular in law, and inappropriate to this case.

Also want an exception noted to the instruction in which you said if the jury believed the testimony of Rossi as related by Whitney beyond a reasonable doubt they could base a verdict of guilty upon it.

The COURT.—No, I didn't say that. I don't think you can convict in this case upon Rossi's statement alone; I would not submit a case upon Rossi's statement alone, but you can consider his statement as disclosed by Mr. Whitney with all the

other statements in the case; you cannot convict upon Rossi's statement alone.

Mr. DORE.—Note an exception.

The COURT.—I will withdraw the last instruction I gave you with relation to the endorsement upon the bill of sale since exception was taken, you will disregard what I said about it. [94]

And now, in furtherance of justice, and that right may be done, the said defendants tender and present to the court the foregoing as their bill of exceptions in the above-entitled cause, and pray that the same may be settled and allowed and signed and sealed by the Court and made a part of the record in said cause.

_____,

Attorney for Defendants Charles Romeo, August Bianchi, John Gatt and Frank Gatt.

HERMAN S. FRYE,

Attorney for Defendant Romeo Tronca.

[Endorsed]: Lodged Apr. 14, 1926. [95]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

The defendants in the above-entitled cause having tendered and presented the foregoing as their bill of exceptions in said cause to the action of the Court, and in furtherance of justice and that right may be done him, and having prayed that the same may be settled and allowed, authenticated, signed and sealed by the Court and made a part of the

record herein; and the Court having considered said bill of exceptions and all objections and proposed amendments made thereto by the Government, and being now fully advised, does now in furtherance of justice and that right may be done the defendants, sign, seal, settle and allow said bill of exceptions as the bill of exceptions in this cause, and does order that the same be made a part of the record herein.

The Court further certifies that each and all of the exceptions taken by the defendants, as shown in said bill of exceptions, were at the time the same were taken allowed by the Court.

The Court further certifies that said bill of exceptions contains all the material matters and evidence material to each and every assignment of error made by the defendants and tendered and filed in court in this cause with said bill of exceptions. [96]

The Court further certifies that said bill of exceptions was files and presented to the Court within the time provided by law, as extended by the orders of the Court heretofore made herein.

Done and ordered in open court, counsel for the Government and defendant being now present, this 11 day of March, 1927.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Mar. 11, 1927. [97]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING MAY 1, 1926, TO FILE RECORD.

For good cause shown, IT IS HEREBY ORDERED that the time for filing the record in the above-entitled cause in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is extended to and including the 1st day of May, 1926.

Done in open court, this 22 day of March, 1926.

JEREMIAH NETERER,
Judge.

General Order Book No. 12, at page 172. [98]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING AUGUST 1, 1926, TO FILE RECORD.

For good cause shown, IT IS HEREBY ORDERED that the time for filing the record of the above-entitled cause in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 1st day of August, 1926.

Done this 12 day of July, 1926.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Jul. 12, 1926. [99]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING DECEMBER 10, 1926, TO FILE RECORD.

For good cause shown, IT IS HEREBY ORDERED that the time for filing the record in the above-entitled cause in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is extended to and including the 10th day of December, 1926.

Done in open court, this 1 day of Nov., 1926.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Nov. 1, 1926. [100]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING APRIL 1, 1927, TO FILE RECORD.

For good cause shown, IT IS HEREBY ORDERED that the time for filing the record in the above-entitled cause in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is extended to and including the 1st day of April, 1927.

Done in open court this 21 day of March, 1927.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Mar. 21, 1927. [101]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make a transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, and include therein the following:

Indictment.

Plea.

Record of trial and empanelling jury.

Verdict.

Motion for new trial.

Judgment and sentence.

Petition for writ of error.

Assignment of error.

Order allowing writ of error and fixing amount of bond.

All orders extending time for filing bill of exceptions.

All orders extending time for filing record.

Bill of exceptions and amendments.

Writ of error.
Citation.
Defendants' praecipe.

JOHN F. DORE,
F. G. REAGAN,
HERMAN S. FRYE,
Attorneys for Defendants.

[Endorsed]: Filed Mar. 21, 1927. [102]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 102, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs incurred in my

office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause amounting to $40.10 have been paid to me by attorneys for the plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original writ of error and citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 24th day of March, 1927.

[Seal] ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [103]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before the Honorable Jeremiah Neterer, one of you, between Frank Gatt, John Gatt, Romeo Tronca, Charles Romeo and August Bianchi, the plaintiffs in error, and the United

States of America, the defendant in error, a manifest error happened to the prejudice and great damage of the said plaintiffs in error, as by their complaint and petition herein appears, and we being willing that that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so that you have the same at the said city of San Francisco within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that [104] the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 12th day of January, 1926, and of the Independence of the United States one hundred and fiftieth.

[Seal] ED. M. LAKIN,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division,

By ——————————.

Acceptance of service of within writ acknowledged this 12 Jan., 1926.

C. T. McKINNEY,
Attorney Ptff.

[Endorsed]: Filed Jan. 12, 1926. [105]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to THOMAS P. REVELLE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said Frank Gatt, John Gatt, Charles Romeo, Romeo Tronca and August Bianchi are plaintiffs in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 12th day of January, 1926.

JEREMIAH NETERER,
United States District Judge.

[Seal] Attest: ED. M. LAKIN,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division. [106]

Acceptance of service of within citation acknowledged this 12 Jan., 1926.

C. T. McKINNEY,
Attorney Ptff.

[Endorsed]: Filed Jan. 12, 1926. [107]

[Endorsed]: No. 5131. United States Circuit Court of Appeals for the Ninth Circuit. Charles Romeo, August Bianchi, John Gatt, Frank Gatt, and Romeo Tronca, Plaintiffs in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed April 25, 1927.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 5131

United States Circuit Court of Appeals

For The Ninth Circuit

CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, and ROMEO TRONCA,

Plaintiffs-in-Error,

—VS.—

UNITED STATES OF AMERICA,

Defendant-in-Error.

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFFS-IN-ERROR

JOHN F. DORE,
F. C. REAGAN,
H. S. FRYE,
Seattle, Washington,
Attorneys for Plaintiffs-in-Error.

THE ARGUS PRESS - SEATTLE

No. 5131

United States Circuit Court of Appeals

For The Ninth Circuit

CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, and ROMEO TRONCA,

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—VS.—

UNITED STATES OF AMERICA,

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ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, and ROMEO TRONCA,
Plaintiffs-in-Error,

—vs.—

UNITED STATES OF AMERICA,
Defendant-in-Error.

No. 5131

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFFS-IN-ERROR

STATEMENT OF THE CASE

The plaintiffs-in-error, Frank Gatt, John Gatt, Charles Romeo, Romeo Tronca, and August Bianchi, were convicted of conspiracy to violate the National Prohibition Act. The indictment charged:

> "That it was then and there further the plan, purpose, and object of said conspiracy, and the object of said conspirators so conspiring together as aforesaid, to knowingly, wilfully, and unlawfully conduct and maintain a common nuisance at certain premises within the city of Seattle, in the Northern Division of the Western District

of Washington, and within the jurisdiction of this court, to-wit, 404 Fifth Avenue South, Seattle, Washington, by keeping, selling and bartering therein certain intoxicating liquors, to-wit, whiskey, distilled spirits, and divers other liquors, etc." (R. 4)

There were eleven overt acts laid, ten having to do with charging the possession and sale of intoxicating liquors at 404 Fifth Avenue South, Seattle, Washington, and the maintenance of a nuisance. Overt Act 10 charged that they possessed intoxicating liquor at Room 17, 404½ Fifth Avenue South.

The testimony of the prohibition agents was that at various dates over a considerable space of time they visited the place at 404 Fifth Avenue South, known as the Monte Carlo Cafe. On February 28th, the day the arrest was made, a cache of liquor was found in Room 17, 404½ Fifth Avenue South. The testimony was that the defendants rented this room.

There was sufficient conflict in the testimony to take the case to the jury. The plaintiffs-in-error ask for a reversal upon errors of law occurring at the trial.

ASSIGNMENTS OF ERROR

I.

The court erred in declaring Mrs. Frank Gatt, the wife of one of the defendants, an incompetent witness, and in refusing to allow her to testify.

II.

The court erred in admitting the testimony of the

witness Whitney as to the conversation he had with Rossi, who was not on trial and not present in court, and which was told to Whitney at the time Rossi was informing against his associates.

III.

The court erred in telling the jury that the statement made by Rossi to Whitney, outside of court, should be weighed the same as if it had been given in court by Rossi himself. And the court erred in this same regard in telling the jury to consider in any manner the testimony of Rossi (R. 28-29).

IV.

The court erred in allowing the witness Whitney to tell the jury what the notations on Exhibit 46 meant, and in admitting Exhibit 46 in evidence (R. 28-29).

V.

The court erred in not granting a new trial because of the prejudicial argument of the Government's attorneys (R. 28-29).

ARGUMENT

Assignment of Error I.

Mrs. Frank Gatt was produced as a witness on behalf of the defendants (R. 81), when the following occurred:

Direct Examination:

"Q. What is your name?

A. Mrs. Frank Gatt.

Q. What relation are you to the defendant Frank Gatt?

A. His wife.

Q. I will ask you, Mrs. Gatt, where you live; where the family home is?

Mr. McKinney: We object to any testimony from this woman on the ground that she is the wife of the defendant.

The Court: If an objection is made on that ground the objection is sustained.

Mr. Dore: Note an exception. Does Your Honor hold she won't be allowed to testify at all?

Mr. McKinney: Not on behalf of her husband.

The Court: You say you offer her in behalf of the other defendants?

Mr. Dore: I am offering her as a witness.

The Court: She can testify in behalf of any of the other defendants; if you offer her as a witness for any of the other defendants, except her husband, she will be permitted to testify; but she cannot testify in behalf of her husband over the objection of the Government.

Mr. Dore: Note an exception."

The court held that Mrs. Gatt, because she was the wife of the defendant Frank Gatt was an incompetent witness in behalf of her husband.

In the case of *Randleman v. United States*, 18 Fed. (2d) 27, decided by this court, the wife of a defendant is held to be a competent witness and the denial to the defendant of the right to avail himself of her testimony is sufficient grounds for reversal. The sole question for decision in that case was the refusal to allow the wife to testify in a Federal court in the State of Washington. This court held that she was a competent witness and that the case should be reversed on that ground alone. That case is decisive on the first assignment of error and must cause a reversal.

ASSIGNMENT OF ERROR II.

Under this Assignment a number of assignments of error can be disposed of.

James Rossi was not apprehended and was not on trial. On page 76 of the Record appears the following:

> "I had a conversation with Rossi in September, 1924. This conversation took place at Sixth or Seventh Avenue and Jackson Street. He went out driving with me in my automobile. He was not under arrest, he was simply riding with me in my automobile. I met him by prearrangement, for the purpose of having a conversation with him. I talked with him in December over the telephone. He told me then over the telephone that he collected police graft and sheriff's graft. He told me that Frank Gatt was the king of the grafters and was getting rich; that he didn't like it and that

lots of the Italians didn't like it, and for that reason he told me the story. He told me he was telling me the story because he wanted to help me catch Frank Gatt. He told me he was collecting for Gatt about $12,000 a month. He said Gatt was paying him $110 a month for this collection. He arranged to call me up on the telephone and tell me what was going on. He called me before this raid."

This was cross examination, but is set out here so as to make clear the fact that the direct testimony of William M. Whitney which was being objected to as to his relations with Rossi was incompetent and inadmissible.

"The witness Whitney further testified that he questioned the defendant Gatt quite closely regarding the ownership and operation of the Monte Carlo because a short time previously he had talked a number of times with one of the employees of Frank Gatt, a defendant named James Rossi; that the witness talked to Rossi in December, 1924, and in January, 1925, and February, 1925, and talked to him personally on a number of other occasions during those months over the telephone; that Rossi stated that he was at all those times before the raid on the Monte Carlo and was still in the employ of and working with Frank Gatt; that he went to work first for Frank and John Gatt several months prior to November, 1923, as a bartender in the Monte Carlo at one hundred ten dollars per month; that he worked one of the shifts of eight

hours at the Monte Carlo from the time of his employment until in the early summer of 1924, after which time he became an outside man in the selling and handling of whiskey and in helping to operate some stills for the Gatts and the Monte Carlo outfit and also became a collector for the Gatts, which Rossi stated to the witness was his business at the time of these conversations. Rossi further told witness that while he was bartender John and Frank Gatt were the owners of the Monte Carlo and the principal ones connected with the Monte Carlo outfit; that in the Monte Carlo outfit were Louis Cicci, Frank Gatt, John Gatt, Charles Romeo, Romeo Tranca and August Bianchia; that until the summer of 1924, he sold whiskey over the bar; that they always had a bottleman or man in front of the bar whose business it was to carry the bottle; that Frank Gatt carried on his whiskey business out of the Monte Carlo and saw those he supplied with moonshine in the office of the Monte Carlo; that when he, Rossi, went to work he would find a certain amount of the money left in the cash-register; that he rang up the money in the cash-register for the sales of whiskey and that Frank Gatt at least once a day came and counted up the money and would take the money and that sometimes John Gatt would come and count up and take the money; that he would get his wages as long as he was at the Monte Carlo from either Frank or John Gatt and that he has seen August Bianchia also get his money from John or Frank Gatt.

Rossi stated to witness that some one came into the Monte Carlo two or three days after Rossi had sold Mr. Whitney whiskey in November, 1925, and told Frank Gatt that it was Whitney to whom he had sold whiskey a short time before, and that Gatt got scared and told Rossi to lay off a few days on the selling; that the Gatts became worried in January, 1924, over the rumor that Mr. Whitney was attempting to apprehend the Monte Carlo and on January 19, 1924, Frank Gatt made a bill of sale to Charles Romeo and Romeo Tronca; that the bill of sale stated that the price was six thousand dollars; that this was a fake bill of sale; that neither Tronca nor Romeo paid Frank Gatt anything, that they simply allowed Gatt to transfer the property to them and that at all times up into February, 1925, Frank Gatt and John Gatt were the owners of the Monte Carlo and neither Rossi, Tronca or Romeo had anything to do with the Monte Carlo as owners and that Frank Gatt continued to take the money every day after he executed the bill of sale just like he did before. That one of the reasons that Tronca and Romeo in February, 1924, executed a bill of sale of one-third interest in the Monte Carlo to Rossi was that Rossi applied for and got from the city council of Seattle a card-room and pool-table license because only citizens could get licenses and neither Tronca nor Romeo were citizens; that Rossi did not put up any money for this alleged interest; that this arrangement was gone through at the

request of Frank and John Gatt. That he, Rossi, executed a bill of sale for his interest over to Tronca and Romeo; that neither Tronca nor Romeo paid him anything for this. That Charles Romeo was the right-hand man of Frank Gatt, and they worked together in the whiskey business out of the Monte Carlo; that later Romeo Tronca made a bill of sale to Charles Romeo; that Tronca, so far as the Monte Carlo is concerned, merely held title to cover up for Frank Gatt; that later Romeo Tronca made a bill of sale to a fictitious person under the name of Tony Saraci and when Rossi talked to witness in February, 1925, they had not yet found anyone who would answer as Tony Saraci; that Rossi, Romeo, and Tronca had often talked the matter over with Frank Gatt as to the covering up of the ownership; that these fake bills of sale; that he knew Gatt paid Romeo and Tronca money but he did not know exactly how much they were getting but he did know August Bianchia was getting one hundred ten dollars per month; that room 17 at the Saint Paul Rooms, 404½ Fifth Avenue South, just over the Monte Carlo was used as a *chach* and had been used for a long time and even before he, Rossi, went to work at the Monte Carlo and that it was still being used in February, 1925, and that Rossi explained to the witness just where the secret cache was in room 17, and how to open it and get into it; that if they raided the Monte Carlo and searched the bartender they would find the key on his person which would open it and get

into it; that they sometimes carried 20 to 25 gallons of whiskey and several cases of bonded stuff in this cache. *That Rossi told the witness in February, 1925, that he would notify the witness when the cache was filled up and said that they were about to put a large quantity of liquor in the cache and he, Rossi, would phone witness when it was full* and that Rossi did a few days later 'phone him that the liquor was in the cache and he would find the key to the cache and said that Gatt often came in the evening to the office in the Monte Carlo and concluded his deals for liquor in the office. The defendant Rossi also stated to the witness that if they arrested and searched Frank Gatt, they would find in his pocket papers and documents showing the places that the Gatts were doing business with the amount they paid; that defendant Rossi further stated to witness that while he was working as bartender August Bianchia was working as morning bartender, working until about four o'clock in the afternoon, at which time Rossi went on shift; that Bianchia had a bottleman as well as he, Rossi. Rossi further stated to the witness that Frank Gatt was working in the Monte Carlo as a bartender up until the early part of 1923, after which time he did not work very much.

"The witness Whitney further stated that Rossi had told him he was just a day or two before the raid on the Monte Carlo and that he was still in the employ of Frank Gatt, getting one hundred and ten dollars per month and had informed the

witness that Room 17 of the St. Paul Rooms, 404½ Fifth Avenue South was being fitted up and well stocked with liquors and that the witness would find the cache full as he had told witness a few days before he would let him know when it was stocked; that this cache was merely a working cache for the Monte Carlo and a few of the smaller establishments for which the Monte Carlo furnished whiskey around there and that the cache would be full by the time we could make the raid." (R. 64-69)

At this point the court was asked to instruct the jury that this testimony only goes as against the defendant Rossi and cannot be taken to establish any fact as against any other defendant. The court refused the request. And on page 70 of the Record the following occurred:

"Mr. Rossi also stated that in 1925, a few days before the raid, he was working under the direction of the Gatts and Frank Gatt in particular and was collecting from other bootlegging establishments which Frank Gatt and John Gatt operated out of the Monte Carlo and was furnishing liquor and collecting thousands of dollars a month, as high as twelve thousand dollars a month, and turned it over to Frank Gatt as protection and graft money from these institutions and brought it up to the office and turned it over to Frank Gatt in the office of the Monte Carlo.

MR. DORE: I move that testimony be stricken and the jury instructed to disregard it as incompetent, irrelevant and immaterial.

THE COURT: With relation to the collection of the graft money, that may be stricken.

MR. DORE: Note an exception."

It is apparent from the cross examination of the witness Whitney, and apparent from the testimony itself on direct examination, that Rossi at the time he had the conversation with Whitney had turned traitor to his associates. Nothing that he told Whitney by the widest scope of imagination could be considered as a statement made in furtherance of the conspiracy. As Whitney says himself, he was riding around in Whitney's automobile and laying plans to aid Whitney in the apprehension of his colleagues. The purpose of Rossi's testimony was to furnish Whitney with means to apprehend and convict his associates. Rossi wasn't on trial, the testimony was not admissible against him because he was not being tried; it was not admissible against any of the other defendants because none of them were present at the time the conversation took place, and furthermore it was not admissible under the rule of statements made during the life of the conspiracy in furtherance thereof.

But when the court came to his instruction, to which exception was taken (R. 28) he says:

> "Is any credence to be placed in the testimony of Pepe, or the statements made by Rossi to Whitney, as disclosed by Mr. Whitney. Pepe says that a conspiracy was formed. Whitney said what Rossi told him with relation to the activities of the defendant Frank Gatt. From the statements of both of these parties they were parties to the conspiracy. Pepe said what Gatt did, that he

acted under the direction and supervision of Gatt; that the holding of the bill of sale which was executed in January, 1925, was without his knowledge—he knew nothing about it—it was given to him by Frank Gatt and that Gatt told him what his name was to be henceforth; and you heard his testimony with relation to statements made to him by Frank Gatt with relation to the conduct of the parties. Now you are instructed that Pepe's testimony, likewise the statement of Mr. Rossi under the law are denominated accomplices, and the testimony of an accomplice is from a polluted source. Now the testimony of an accomplice should be received with care and caution and subjected to careful scrutiny in the light of all of the other evidence in the case; and the jury ought not to convict upon the testimony of an accomplice alone unless after a careful examination of such testimony the jurors are satisfied beyond a reasonable doubt of its truth and that they can safely rely upon it." (R. 92-3)

The jury were told in this instruction that Whitney's recital of his conversation with Rossi was the same as if Rossi were present in court and giving the testimony. And to emphasize to the jury that Whitney's statement as to what Rossi said should be treated the same as if they had heard it from the lips of Rossi himself, the court told the jury that Rossi was an accomplice. The court tells the jury that Pepe, one of the indicted persons, who under oath gave testimony against the defendants, was of the same class of witness as Rossi and that Rossi's testimony should

be weighed just the same as that of Pepe, and that they were both accomplices, and that the jury had the right—after applying the cautionary instruction as to the valuation to be given to the testimony of an accomplice—to place the same reliance upon the statements made by Rossi to Whitney as upon the sworn statements of Pepe on the witness stand. To say that Whitney's recital of what Rossi told him makes the statements as related by him the same as if they came from Rossi's lips upon the witness stand, the same as if Rossi were subjected to cross-examination, is a legal absurdity. The instruction was erroneous and prejudicial.

The instruction was erroneous on another ground, and that was because the testimony of Rossi was not admissible or competent against any of the defendants and could not be weighed for any purpose against them. But when you take this instruction and consider that it is erroneous because it gave to the statements of the absent Rossi the same standing as if he were a witness in court, coupled with the fact that it was purely inadmissible, must cause a reversal of this judgment.

In Gatt's pocket was found a piece of paper which was marked Exhibit 46 (R. 60). Over objection the following testimony was given:

> "Government's Exhibit 46 I took from his vest pocket, folded up in the way it naturally folds up.
>
> Mr. Whitney identified Government's Exhibit 46, as a paper which he took out of Frank Gatt's vest pocket, folded up naturally, and testified that

he was familiar with the premises and buildings mentioned on the exhibit as they were on February 28th, 1925.

Q. Now, Mr. Whitney, are you familiar with those premises described in that exhibit?

A. Yes, sir.

Q. Do you know what kind of premises those buildings were?

Objected to by the defendants on the ground that it is incompetent, irrelevant and immaterial. Objection overruled and an exception allowed.

A. Yes, sir.

Q. What kind were they?

Same objection by the defendants, on the same grounds.

The Silver Dollar is a soft-drink joint at 217½ Second Avenue South; 116 Third Avenue South is a soft-drink bar and bootlegging joint. 104½ Fourth Avenue South was a soft-drink bar and bootlegging joint.

MR. DORE: We ask an exception to all this testimony.

THE COURT: Yes, note an exception.

That the Silver Dollar is a soft-drink joint at 217½ Second Avenue South.

That 116 Third Avenue South is a soft-drink bar, and bootlegging joint.

That 104½ Fourth Avenue South was a soft-drink bar and bootlegging joint.

215 Second Avenue South at that time was a bootlegging joint and had a bar and soft drink place similar to the Silver Dollar near it.

The South Pole was at the northwest corner of Dearborn and 6th Avenue South, a soft-drink bar and bootlegging joint.

211½ Second Avenue South was a bootlegging joint downstairs similarly fitted up as the Silver Dollar.

105 Washington Street was a bootlegging joint and soft-drink bar.

217½ Washington Street was up to a few days before the raid on the Monte Carlo a bootlegging and soft-drink joint.

104 Washington Street was a sort of a soft-drink and bootlegging joint.

101 Occidental up to a few days before the raid on the Monte Carlo was a bootlegging joint and a soft-drink place in the basement under Joe Dizard's.

On the reverse side of Exhibit 46:

215 Second Avenue South was a bootlegging joint at that time." (R. 60-62)

This testimony was incompetent, irrelevant and immaterial. It was offered for the purpose of showing that these were places from which Frank Gatt was collecting protection money for the sheriff and chief of police. It could have no other purpose in the case and could influence the jury in no other manner. It was introduced solely for this purpose. The defendants were charged with conspiracy. The *situs* of this conspiracy was laid at 404 Fifth Avenue South, and the only testimony relating to any other place was

that on the floor above 404, in Room 17, there was a liquor cache, the liquor being taken from the cache to 404 Fifth Avenue South and there disposed of. Testimony such as this had no relevancy to the issue at all.

On page 81 of the Record appears the following cross examination of the defendant Frank Gatt:

> "Q. You were convicted—you and Cicci were convicted of the possession of intoxicating liquor out of that place in 1923?
>
> Defendants object on the ground that it is incompetent, irrelevant and immaterial. Objection sustained and the jury instructed to disregard it."

The Government sought to prove that Gatt and another indicted with him was convicted in 1923 of the possession of intoxicating liquor at the place laid in this indictment. Objection to this was sustained.

On page 83 of the Record, counsel made the following improper argument:

> "* * * These defendants are charged with conspiracy, they have taken the stand in their own behalf, three of them, and we tried to examine them on certain things connected with that place; we tried to show you that this place was raided and Frank Gatt came and pleaded guilty, and the court would not let us do it—
>
> "* * * We tried to bring out all the other facts so that you might have the whole story; Mr. Dore objected I suppose feeling he was protecting the rights of his clients—"

Despite all that the court could do—and it is our

contention that he did not do sufficient—time and time again the district attorney kept repeating to the jury his attempt to get into the case testimony that the court had excluded, and kept insinuating that if he only had been permitted to get it in, the jury would have learned something to their benefit. The prejudicial conduct of the district attorney is shown again on page 82 of the Record, where he says:

> "When you find a crowd of men like these in your city, some of them not naturalized, according to the testimony, when you find them together,——"

There was no testimony in the record that the defendants were not naturalized. The jury saw them in court. They were all Italians, as their names indicated, and the jury was told that they were not naturalized. And a similar argument made by the same district attorney was held grounds for reversal by this court, in the case of *Fontanello v. United States*, No. 5045, 19 Fed. (2d) 921, decided by this court on June 13, 1927.

And equally improper, though less prejudicial, were the remarks of the assistant United States attorney, as appears on page 82 of the Record, as follows:

> "I will say to this jury if you want to rid this city of one of its most corrupt influences, and you find that the evidence so warrants in this case, you will have done the city one of the best services in years."

This statement, when coupled with the remarks of his chief, show that the argument was so grossly

prejudicial of itself as to require a reversal of this judgment.

We respectfully contend that the judgment should be reversed.

JOHN F. DORE,
F. C. REAGAN,
H. S. FRYE,
Attorneys for Plaintiffs-in-Error.

In the

United States Circuit Court of Appeals

8

For the Ninth Circuit

No. 5131

CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, FRANK GATT and ROMEO TRONCA,
Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, DISTRICT JUDGE

Brief of Defendant in Error

THOS. P. REVELLE,
United States Attorney.
PAUL D. COLES
Assistant United States Attorney.
Attorneys for Defendant in Error.
310 Federal Building, Seattle, Wash.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5131

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HONORABLE JEREMIAH NETERER, DISTRICT JUDGE

Brief of Defendant in Error

STATEMENT OF THE CASE

The evidence during the trial showed that the Gatt brothers, together with Charles Romeo and Romeo

Tronca, had owned and conducted the Monte Carlo Cafe in the City of Seattle, Washington, from which place they sold and distributed various kinds of intoxicating liquor, both in retail and wholesale lots; that room No. 17, of 404½ Fifth Avenue South, was the place of concealment of the intoxicating liquor which was distributed; that 404½ Fifth Avenue South was a hotel, and room No. 17 had been constructed as a cache for the liquor and at the time of the raid a large amount of whiskey was found in said room (Tr. 63); that one of the defendants in the case testified on behalf of the Government and detailed the various activities of the various defendants during the time of the conspiracy mentioned in the indictment (Tr. 34); that all of the defendants were on trial with the exception of defendant Rossi; that all of the defendants on trial were convicted.

ARGUMENT

I.

The first error assigned by plaintiff in error is the refusal of the Court to permit Mrs. Frank Gatt to testify on behalf of the defendants and cite as authority the case of *Rendleman vs. United States*, 18 Fed. 2nd, page 27, to support their contention. There is a dis-

tinctive difference between the facts in this case and the facts in the *Rendlemen* case. In the *Rendlemen* case the witness was placed upon the stand to testify on behalf of her husband, which evidence was refused by the Court, and thereafter counsel made an offer of proof as to what she would testify to. He was not permitted to make his offer of proof and exception was taken thereto. In this case counsel placed the witness upon the stand and after it was ascertained that she was the wife of one of the defendants, an objection being made by the Government, she was not permitted to testify. The Court made inquiry as to whom she was to testify for and counsel refused to state whether it was on behalf of the other defendants, or on behalf of her husband (Tr. 82). No offer of proof was made as to what she would testify to. Therefore, it cannot be said now that the defendants were prejudiced by the fact that she was not permitted to testify. The Court cannot possibly say now that any prejudicial error was committed because there is no showing that what she would have testified to would have been competent, relevant or material. The Court must have something upon which to predicate error, and in the absence of an offer of proof the Court cannot now say that the defendants' rights were prejudiced inasmuch as counsel refused to state on whose behalf she was to testify.

(Sec. 1246 C. S.; *Rendlemen vs. United States,* 18 Fed. 2nd, page 27; *Olmstead vs. United States,* 19 Fed. 2nd, page 550-552; *Sarkisian vs. United States,* 3 Fed. 2nd, page 599).

II.

Under assignment No. II, counsel has raised numerous questions of error, the first of which can be discussed under sub-heading "A."

A. There was no error in the admission of testimony found on page seven (7) of the plaintiff-in-error's brief, and found also on page seventy-six (76) of the transcript, inasmuch as the testimony there elicited was brought out on cross-examination by counsel for the defense and no exception was taken thereto. Consequently, counsel cannot be heard to complain now that it was prejudicial. The testimony found on pages eight (8), nine (9), ten (10), eleven (11) and twelve (12) and a portion of the testimony on page thirteen (13) of appellants' brief, will be found on pages sixty-four (64), sixty-five (65), sixty-six (66), sixty-seven (67), sixty eight (68) and a portion of page sixty-nine (69) of the transcript. *There was no objection made to said testimony nor exception taken,* and no assignment of error was predicated thereon.

Sarkisian vs. United States, 3 Fed. 2nd, 599. The only assignment of error covering any testimony of the witness Whitney is found on page twenty-six (26) of the transcript, at paragraph II, from which assignment one is unable to state which portion of Whitney's testimony counsel objects to. The only exception taken was on page sixty-nine (69), after which the Court instructed the jury as follows:

"THE COURT: I will state that unless the conspiracy is established between these parties, of which Rossi is a part, then the statement made by Rossi could not be construed against any of the other defendants except himself, nor can the statement itself be construed as establishing conspiracy as against the other parties, but only binds Mr. Rossi, and if a statement was made in furtherance of the conspiracy, and the conspiracy is established, then it may be construed as against all parties."

Olmstead vs. United States, 19 Fed. 2nd, 550 at 552.

Allen vs. United States, 4 Fed. 688.

WITNESS: (Continued). Mr. Rossi also stated that in 1925, a few days before the raid, he was working under the direction of the Gatts and Frank Gatt in particular, and was collecting from other bootleg-

ging establishments which Frank Gatt and John Gatt operated out of the Monte Carlo and was furnishing liquor and collecting thousands of dollars a month, as high as twelve thousand dollars a month, and turned it over to Frank Gatt as protection and graft money from these institutions and brought it up to the office and turned it over to Frank Gatt in the office of the Monte Carlo.

MR. DORE: I move that testimony be stricken and the jury instructed to disregard it as incompetent, irrelevant and immaterial.

THE COURT: With relation to the collection of the graft money, that may be stricken. Proceed."

Counsel states, on page thirteen (13) of his brief, that the Court refused to instruct the jury, which statement is erroneous in view of the foregoing instructions heretofore set forth.

The next conversation objected to is found on page seventy (70) of the transcript, starting with the word "witness," four lines from the top of the page. That testimony was stricken by the Court at the time. (Tr. 70). Counsel's brief does not clearly set forth the exact happenings as they took place, as the Court will

find from its entire inspection of Mr. Whitney's testimony, beginning on page fifty-five (55) of the transcript and continuing through to page seventy-six (76). Most of the conversation related by Rossi to Whitney was detailed on the day of December 29, 1925. (Tr. 68), and it was not until the following day that any exception was taken to any of the testimony of Mr. Whitney. (Tr. 69). It would be necessary for the Court to take note of these facts in order to clearly understand counsel's brief.

B. Under "B" counsel has objected to the instruction of the Court as to the testimony given by Mr. Whitney of his conversation with the defendant Rossi (Tr. 28). This conversation was had without objection by counsel for the defense. It was competent as being statements of one of the co-conspirators made in furtherance of the conspiracy, and was a part of the *res gestae*, and were made prior to the termination of the conspiracy and before any arrests were made, and while Rossi was a member of the conspiracy. (Tr. 64 and 68). (See *Fur Co. vs. United States*, 7 L. Ed., at pages 450, 453), wherein the Court said:

"The opinion of the court in the present case is not less correct whether Davis was considered by the jury as having acted in conjunction with Wallace or strictly

as his agent, for we hold the law to be that where two or more persons are associated together for the same illegal purpose, *any act or declaration of one of the parties in reference to the common object and forming a part of the res gestae may be given in evidence against the others*, and this, we understand, upon a fair interpretation of the opinion before us to be the principle which was communicated to the jury."

United States vs. Olmstead, 19 Fed. 2nd, page 550.

However, any view that the Court may take of the matter, the defendant could not possibly be prejudiced by reason of the fact that the Court instructed the jury that all such testimony came from a polluted source. The witness Whitney had testified to his conversations with Rossi, and they were competent to show that Rossi was a member of the conspiracy. The jury could not possibly have been confused by reason of the fact that the Court instructed the jury that such testimony was to be carefully scrutinized.

C. The next assignment of errors covers the admission of the Exhibit No. 46. (Tr. 60). The defendants were charged with a conspiracy to sell intoxicating liquor and it was competent to show that they were connected with various other bootlegging places be-

sides the Monte Carlo as there was no specific charge in the indictment that they found the evidence in the Monte Carlo cache. From examination of Exhibit No. 46, the Court can see the nature of the same which shows very plainly on its face that certain amounts of money were being collected from those places, and it also shows that a number of the places had been scratched off, and Mr. Whitney testified that those places had only recently been raided and closed down, and the defendant Rossi had stated that Gatt would have such a list on his person, which would show the places he was doing business with. There was plainly no error in the admission of such testimony in the face of Mr. Whitney's explanation of them, found on page sixty (60), sixty-one (61) and sixty-eight (68) of the transcript.

D. There was no error upon the grounds predicated by the defendants on page nineteen (19) of their brief for the reason that it was perfectly permissable to show that the defendants had been convicted of the possession of intoxicating liquor in 1923. (*U. S. vs. Merrill*, 6 Fed. 2nd, 120, 9th C. C. A.) Consequently, the remarks made by counsel for the Government could have in no wise prejudiced the defendants in any way.

The other remarks, found on page twenty (20) of the plaintiff in error's brief were not prejudicial inasmuch as the Court instructed the jury to disregard any such remarks. (Tr. 82 and 83). Counsel has not seen fit to set out the fact that the Court instructed the jury to disregard such remarks. In the *Fontanello* case (*Fontanello vs. United States*, No. 5045, 19 Fed. 2nd, 921), the Court had not so instructed the jury and there was a great deal more said which would tend to inflame the jury than in the present case. The last matter mentioned on page twenty (20) and stated by the Assistant United States Attorney, was clearly proper and within the confines of an argument upon the facts, because the jury was asked to so consider it by the language, "* * * and you find the evidence so warrants in this case * * *."

It is respectfully urged that there was no error committed in this case.

THOS. P. REVELLE,
United States Attorney.

PAUL D. COLES,
Assistant United States Attorneys.
Attorneys for Defendant-in-Error.

No. 5131

United States Circuit Court of Appeals

For The Ninth Circuit

CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, FRANK GATT and ROMEO TRONCA,

Plaintiffs in Error,

—VS.—

UNITED STATES OF AMERICA,

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ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

JOHN F. DORE,
F. C. REAGAN,
H. S. FRYE,
Attorneys for Plaintiffs in Error.
Seattle, Washington.

THE ARGUS, SEATTLE

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No. 5131

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

To the Honorable Judges of the Above Entitled Court:

Come now the plaintiffs in error and respectfully petition the court to grant a rehearing in this case, and in support of their petition represent as follows:

I

In the opinion filed herein on the 23rd day of January, 1928, the court while holding that the action of the trial judge in refusing to allow the wife of Frank Gatt, one of the defendants, to testify was erroneous, announced as law that the error was not available to the plaintiffs in error because there was no offer of testimony made. On this point the opinion reads:

"The enquiry as to the place of residence of the

witness suggested no answer material to the issues, and even if the court's ruling was assigned as error, there could have been no error unless the attention of the court had been directed to the nature and relevancy of the evidence ought to be added."

This is not the law. There is a wide distinction between the competency of a witness to testify and the competency of evidence.

State v. Von Klein (Ore.), 142 Pac. Rep. 549;

Hoag v. Wright (N. Y.), 66 N. E. Rep. 579.

If an objection is sustained to the evidence of a witness, the ruling cannot be reviewed unless the record discloses an offer to prove by the witness facts relevant to the issues.

Sarkisian v. United States, 3 Fed. (2d.) 599.

If, however, the trial court refused to permit a witness to testify at all because in his judgment he is incompetent as a witness, the error will be reviewed, although no offer of testimony is made.

9 Ency. of Evidence, 164;

38 Cyc., 1331;

Martz Ex. v. Martz (Va.), 25 Gratt. 361;

Mutual Ins. Co. v. Oliver (Va.), 28 S. E. Rep. 594;

Metz v. Snodgrass, 9 W. Va. 190;

Sutherland v. Hawkins, 56 Ind. 323;

State v. Thomas (Ind.), 13 N. E. Rep. 35;

Foree v. Smith (Ky.), 1 Dana 151.

"Where the question is not the competency of the testimony expected to be elicited, but the com-

petency of the witness to testify at all, the party offering the witness is not required to state what he expects to prove by the witness."

9 Ency. of Evidence, 164, *supra.*

"Ordinarily, when a question is asked and the witness is not permitted to answer it, the record must show what the party expected or proposed to prove by the witness, in order to have the action of the trial court reviewed by the appellate tribunal [citing cases]. Where, however, it is not a question of the relevancy or materiality of the testimony, but a question of the competency of the witness, and whether he shall be permitted to testify at all, though his testimony be ever so relevant and material, it was held in *Martz. Ex. v. Martz Heirs*, 25 Gratt. 307, that it is not necessary to state in the bill of exception what the testimony of the witness would be in order to have the action of the court in excluding him reviewed by the appellate tribunal. The fact that he was excluded by the court, upon an objection being made to his testimony by the adverse party, implies that it would be unfavorable to such party."

Mutual Ins. Co. v. Oliver, supra.

"But it is argued that the exception is not well taken, inasmuch as it does not state what was offered to be proved by the witness. It is not a case as to the relevancy of testimony, as in *Carpenter v. Utz*, 4 Gratt. 270, cited by appellee counsel. If it were, it would have been necessary for the exceptor to have shown its relevancy by set-

ting out what could be proved by the witness. But it is a question whether the witness shall be heard at all, though his testimony be ever so relevant and important. It is not necessary to state what his testimony would be in order to present to the appellate tribunal the question as to the legality and propriety of the decision of the lower court; and the adverse party objecting to his giving testimony at all, implies that his testimony would be unfavorable to him."

Martz Ex. v. Martz, supra.

"When a party complains, in this court, of the exclusion of offered evidence by a lower court, we have often held, that such party must show, by a bill of exception properly in the record, what the evidence was which had been excluded. * * * But, in our opinion, there is a wide and marked difference between the questions decided in those cases and the question presented by the record of this case. * * * The matter complained of by the appellants, in this court, was not the exclusion of any particular evidence, but the absolute refusal of the court below to allow a certain witness to testify at all, in the case. Where offered evidence is excluded, it must be made a part of the record before this court can pass upon the question whether the court below has or has not erred in its exclusion. But where, as in this case, the matter complained of is the action of the court, in refusing to allow a witness to testify at all, the grounds of objection to the witness must be shown by a bill of exceptions, and this is all

that need be shown in order to present the matter for our consideration."

Sutherland v. Hawkins, supra.

The ground of objection to Mrs. Gatt's testimony was that she was the wife of one of the defendants on trial; the objection and the ruling of the trial court sustaining it is properly preserved in the bill of exceptions; the objection was urged by the Government and this warrants the implication that the testimony excluded was important, relevant and favorable to the defendants.

The case of *Rendleman v. United States*, 18 Fed. (2d.) 27, is controlling and calls for a reversal of this case. It is worthy of mention that the record in the *Rendleman* case shows that the same questions were asked the witness as in this case, to-wit, her name and address, and that no offer of proof was made or permitted.

That no special assignment of error was made is answered by this and other court's holdings in numerous recent decisions, that in criminal cases manifest prejudicial error will be reversed and corrected, even though not preserved by exceptions or assignments of error.

Bilvoa v. United States, 287 Fed. 125;
Wiborg v. United States, 163 U. S. 632;
Davis v. United States, 9 Fed. (2d) 826;
Schwartz v. United States, 10 Fed. (2d) 900;
Shields v. United States, 17 Fed. (2d) 66;
Van Gorder v. United States, 21 Fed. (2d) 939;
Lamento v. United States, 4 Fed. (2d) 901;
McNutt v. United States, 267 Fed. 670.

II

A majority of the court, in the concurring opinion, holds that the testimony of Agent Whitney concerning reports to him by Rossi, a defendant, not on trial, were inadmissible and so prejudicial as to call for a reversal had timely objection been made. Such objection was made, not once, but repeatedly, and these objections were followed, first, by a request that the trial court instruct the jury to disregard such testimony, and, secondly, *by a motion to strike the same from the case.* The plaintiffs in error, in their efforts to exclude this improper and highly prejudicial evidence, seem to have exhausted every reasonable effort, and the blame for the unfair trial which resulted should be placed upon the trial judge where it properly belongs. In criminal cases, the correct rule to be applied is clearly stated in *Sutherland v. United States*, 19 Fed. (2d) 202, 216:

> "Though the record does not show that any objection was taken in relation to some of the matters mentioned, yet in pursuing the broad inquiry, whether a fair trial was had, we feel at liberty to examine the record as a whole without regard to objections."

In the present case, the record as a whole discloses that the plaintiffs in error did not have a fair trial, that is, a trial conducted in all material things in substantial conformity to law, and that they repeatedly tried to protect their rights in the premises. A reference to the record substantiates this claim:

> "AGENT WHITNEY: Rossi further stated to the witness that in December, 1924, and January,

1925, that either Frank Gatt or John Gatt would come each morning and get the money.

MR. DORE (for Defendants): We ask the jury be instructed that this testimony only goes as against the defendant Rossi, it cannot be taken to establish any fact against any other defendant.

MR. MCKINNEY (for the Government): This is a conversation I understand prior to the determination of the conspiracy.

Q. (By THE COURT): When was the conspiracy?

A. (WHITNEY): It was in the fall of 1924 or early part of January, 1925.

THE COURT: Very well, go ahead.

MR. DORE: I renew the request. Is the request for such an instruction denied at this time?

THE COURT: At this time.

MR. DORE: Note an exception.

Witness (continued): Mr. Rossi also stated that in 1925, a few days before the raid he was working under the direction of the Gatts, and Frank Gatt in particular, and was collecting from other bootlegging establishments which Frank Gatt and John Gatt operated out of the Monte Carlo and was furnishing liquor and collecting thousands of dollars a month, and turned it over to Frank Gatt as protection and graft money from these institutions and brought it up to the office and turned it over to Frank Gatt in the office of the Monte Carlo.

MR. DORE: I move that the testimony be strick-

en and the jury instructed to disregard it as incompetent, irrelevant and immaterial.

THE COURT: With relation to the collection of the graft money, that may be stricken.

MR. DORE: Note an exception.

THE COURT: Note it." (Trans. 69, 70)

In the light of the record, it is not fair to say that this "testimony was admitted without objection," and we feel that the court on maturer consideration will agree with us that the plaintiffs in error, through their attorney, did everything that was humanly possible to keep this prejudicial testimony away from the jury.

> "A fair trial consists not alone in an observance of the naked forms of law, but in a recognition and just application of its principles."
>
> *State v. Pryor*, 67 Wash. 219.

In the celebrated case of *Bram v. United States*, 168 U. S. 540, the defendant objected twice before the witness was permitted to answer, but failed to renew his objection after the answer had been given, and in answer to the contention that the objection had been waived the Supreme Court said:

> "To say that under these circumstances the objection which was twice presented and regularly allowed should have been renewed at the termination of the testimony of the witness, would be pushing to an unreasonable length the salutary rule which requires that exceptions be taken at the trial to rulings which are considered erroneous, and the legality of which are thereafter to be questioned on error. There can be no doubt that the manner in which the exception was al-

lowed and noted fully called attention to the fact that the admission of the conversation was objected to because it was not voluntary, and the overruling of this objection is the matter now assigned as error here."

In the present case the objection urged *called the attention* of the trial court to the fact that the testimony of Whitney concerning admissions and statements of Rossi was inadmissible against his co-defendants, and this was emphasized by the motion to strike this testimony after it had been given. Consequently, the error is reviewable in this court. Nor can any just fault be found with the form of the objection, for it is well settled law that where testimony is inadmissible, and could not under any state of facts be rendered admissible, a general objection is sufficient to present for review the question of the admission of such evidence.

Safford v. United States, 233 Fed. 499.

III

In his closing argument to the jury the attorney for the Government went beyond the limits of proper argument and deliberately went outside of the record for the obvious purpose of arousing prejudice against the defendants in the minds of the jury. This was reversible error.

Fontanello v. U. S., 19 Fed. (2d) 921.

In that case the misconduct was mild and innocuous compared with the misconduct in the present case, yet, in reversing, this court said:

"It is beyond question that the statements of

the district attorney were unjustifiable and censurable. As an officer of the court he signally failed in his duty to act in the interest of justice."

The same situation is presented by the record in this case, as follows:

"MR. REVELLE (District Attorney): When you find a crowd of men like these men in your city, some of them not naturalized, according to the testimony, when you find them together,—

MR. DORE (for Defendants): I object to that as improper argument, and ask the jury to be instructed to disregard it.

THE COURT: The jury will conclude upon the evidence, not conjecture.

MR. REVELLE: These defendants are charged with conspiracy, they have taken the stand in their own behalf, three of them, and we tried to examine them on certain things connected with that place; we tried to show you that this place was raided and Frank Gatt came and pleaded guilty, and the court would not let us do it—

MR. DORE: I object to that as improper argument, and ask the jury be instructed to disregard it.

THE COURT: You will conclude upon the evidence." (Trans. 82, 83)

This was gross misconduct and prejudicial to the defendants, and it was the duty of the court, when challenged, to direct the jury, in *unequivocal language*, to disregard it. It was objectionable for two reasons. In the opening part of the argument quoted the district attorney urged a conviction because the

defendants were foreigners, an argument which this court denounced in the *Fontanello* case. And in the closing part he urged upon the attention of the jury matters which were not in evidence, matters which had been rejected when offered.

> "It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not, and counsel cannot be permitted to make a statement of facts which under the rules of evidence would not be received, if offered, the natural tendency of such facts being to influence the findings of the jury."
>
> *Lowden v. U. S.*, 149 Fed. 673.

Standing alone, the remarks of the district attorney warrant a reversal of this case, but taken in connection with the improper rejection of the testimony of Mrs. Gatt and the admission of the highly prejudicial hearsay testimony of Agent Whitney, it is clear that the plaintiffs in error were not accorded a fair trial and their conviction was illegally secured.

We respectfully submit that a rehearing and reconsideration of this case should be granted and upon such rehearing the judgment of the trial court reversed.

JOHN F. DORE,
F. C. REAGAN,
H. S. FRYE,
Attorneys for Plaintiffs in Error.

The foregoing petition for rehearing is, in my opin-

ion, meritorious and well founded in law and is not interposed for the purpose of delay.

JOHN F. DORE,

Attorney for Plaintiffs in Error.

Seattle, Washington.

No. 5133

United States

Circuit Court of Appeals

For the Ninth Circuit.

LAU SHEE, also Known as LOW FOOK YUNG, also Known as NGONG FON, and also Known as LOW SHEE,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration of the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:

EMERY F. MITCHELL, Esq., 640 State Bldg., San Francisco, California.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, Cal.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 19,212.

In the Matter of LAU SHEE, also Known as LOW FOOK YUNG, also Known as NGONG FON and also Known as LOW SHEE, on Habeas Corpus.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Sir: Please make copies of the following papers to be used in preparing transcript on appeal:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer to petition.
4. Minute order denying petition and sustaining demurrer.
5. Judgment and order dismissing order to show cause and denying petition for writ.
6. Notice of appeal.

7. Petition for appeal.
8. Order allowing appeal and fixing bonds.
9. Assignment of errors.
10. Order regarding Immigration Record.
11. Clerk's certificate.
12. Citation on appeal.

EMERY F. MITCHELL,
Attorney for Petitioner and Appellant.

[Endorsed]: Receipt of a copy of the within praecipe is hereby admitted this 10th day of April, 1927.

GEO. J. HATFIELD,
United States Attorney.

Filed Apr. 14, 1927. [1*]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

19,212.

In the Matter of LOW FOOK YUNG, *alias* LAU SHEE, or LAW SHEE, *alias* AH YOUNG, *alias* NGONG FON, or LOW SHEE. No. 12020/6392.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable United States District Judge Now Presiding in the United States District Court in and for the Northern District of California, Second Division:

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*Page-number appearing at the foot of page of original certified Transcript of Record.

It is respectfully shown by the petition of the undersigned that Low Fook Yung, *alias* Lau Shee, or Law Shee, *alias* Ah Young, *alias* Ngong Fon, or Low Shee, hereinafter in this petition referred to as the "Detained," is unlawfully imprisoned, detained, confined and restrained of her liberty by John D. Nagle, Commissioner of Immigration for the Port of San Francisco, at the Immigration Station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof, and that the said imprisonment, confinement and restraint is illegal, and that the illegality thereof consists in this, to wit, that it is claimed by the said Commissioner that the said Detained is an alien Chinese person who is subject to be returned to the country whence she came under section 19 of the Immigration Act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese Exclusion Law, in that she has been found in the United States in violation of Rule 9, Chinese rules, and of the Supreme Court decisions upon which said rule is based, having secured admission by fraud, not having been, at the time of entry, the wife of a member of the exempt classes, and the said alien has been found in the United States in violation of the Immigration Act of February 5, 1917, in that she entered the United States for an [2] immoral purpose.

It is further claimed by the said Commissioner that the said Detained was arrested on executive warrant of arrest issued by the Secretary of Labor

to answer the said charges, and that after a hearing thereon, which the said Commissioner claims was made and had in full and complete accordance with the provisions of the acts aforesaid, the detained was found to have secured admission by fraud, not having been, at the time of entry, the wife of a member of the exempt classes, and that she entered the United States for an immoral purpose and was ordered deported from and out of the United States for said reasons, and that therefore he, the said Commissioner, intends to deport the said detained away from and out of the United States to the Republic of China, and unless this Court intervenes as hereinafter in this petition prayed for, said detained will be deported from and out of the United States.

But, on the contrary, your petitioner alleges upon his information and belief that the action of the said secretary in issuing said warrant, and in the hearing conducted upon and under said warrant, and in his issuing said order of deportation against the said detained, abused the discretion vested in him, and has made a misconstruction of the statute *of* the prejudice of the said detained in each of the following particulars hereinafter set forth:

Your petitioner alleges that the said detained arrived in the United States as an incoming passenger on the steamship "President Jackson" at the port of Seattle on the 29th day of September, 1923, and that said detained was thereafter admitted into the United States as the wife of Jew Shepp, an American citizen. That ever since said

time the said detained has been at liberty in the United States [3] and has never since departed therefrom.

Your petitioner further alleges upon his information and belief that there was no legal or any evidence whatever to support said warrant of deportation presented to said Commissioner of Immigration or to said Secretary of Labor that the said detained secured admission to the United States by fraud or that the said detained entered the United States for an immoral purpose, or that she ever was at any time guilty of a single act of immorality.

Your petitioner further alleges upon his information and belief that the so-called evidence presented and introduced against the detained, and upon which the pretended warrant was based, to wit, the letter of R. P. Bonham was presented and introduced notwithstanding the fact that said detained objected to the admission of said evidence, and requested that it be stricken out and destroyed, but that nevertheless it was introduced as aforesaid. That said detained further requested said Commissioner to produce the said R. P. Bonham for the purpose of cross-examination, but that said Commissioner wholly failed so to do.

Your petition further alleges upon his information and belief that the so-called evidence presented and introduced against the detained and upon which the pretended warrant of deportation was based, consists of hearsay statements and private reports and other evidence of incompetent, immaterial and

irrelevant character not permitted to be admitted in the courts of justice in the United States, State and Federal.

Your petitioner further alleges upon his information and belief that the said detained was and is ordered deported without due or any process of law or proof of any kind or character proving or tending to prove the alleged charge made against her, and that said detained was not afforded a fair hearing to which she was and is entitled. [4]

That the said detained is in the custody of the said Commissioner and for said reason is unable to verify this petition upon her own behalf and therefore your petitioner does verify this petition upon her own behalf and therefore your petitioner does verify this petition upon behalf of the detained and in her name.

That your petitioner further alleges that the said detained was at all times during her residence in the United States a woman of respectability and good character, and that she has at no time followed any immoral occupation or engaged in any immoral or debasing pursuits.

That your petitioner has not in his possession the record of testimony submitted upon the examination of the case of said detained under direction of the said Commissioner of Immigration, nor any copy of the reports rendered thereon, nor copies of the proceedings had before the Secretary of Labor at Washington, and a copy of said proceedings being in the possession of the said Commissioner of Immigration, your petitioner does there-

fore stipulate that when a copy of the said proceedings is brought before this court and produced by the Immigration authorities in accordance with their custom and practice in cases of this character, that your petitioner will then and there agree and ask that the said immigration record so presented be deemed and considered part and parcel of this petition with the same force and effect as if filed herewith.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for directed to the Commissioner of Immigration, and directing him to hold the body of the said detained within the jurisdiction of this court and present the body of the said detained before this court at [5] a time and place to be specified in said order, together with the time and cause of her detention, so that the same may be inquired into, all to the end that the said detained may be permitted to remain in the United States, having a lawful right to said privilege, and that she may thereafter go hence.

HENRY F. MITCHELL,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

William Shep, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition and he has read said petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters

therein stated upon information and belief, and as to those matters he believes it to be true.

WILLIAM SHEP.

Subscribed and sworn to before me this 4th day of February, 1927.

[Seal] CHARLES D. O'CONNOR,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Receipt of a copy of the within petition is hereby admitted this 5th day of February, 1927.

GEO. J. HATFIELD,
U. S. Attorney.

Filed Feb. 4, 1927. [6]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading and filing the verified petition of Low Fook Yung, *alias* Lau Shee, or Law Shee, *alias* Ah Young, *alias* Ngong Fon, or Low Shee, for a writ of habeas corpus, and

Good cause appearing therefor, IT IS HEREBY ORDERED that John D. Nagle, as Commissioner of Immigration at the port of San Francisco at Angel Island, be and appear before the above-entitled court, Department No. —— thereof, on the 28th day of February, 1927, at the hour of ten o'clock A. M. of said day, to show cause, if any

he has, why a writ of habeas corpus should not issue in this matter and the petition granted as prayed; and

IT IS FURTHER ORDERED that said Low Fook Yung, *alias* Lau Shee, or Law Shee, *alias* Ah Yung, *alias* Ngong Fon, or Low Shee, be not removed from the jurisdiction of this court until further order of this court; and

IT IS FURTHER ORDERED that a copy of this order be served on said John D. Nagle or such other persons as may have the said Low Fook Yung, *alias* Lau Shee, or Law Shee, *alias* Ah Young, *alias* Ngong Fon, or Low Shee, in custody as an officer of said John D. Nagle.

IT IS FURTHER ORDERED that the said detained be admitted to bail upon furnishing a bond in the penal sum of [7] three thousand dollars, conditioned according to law to be approved by me.

Dated: February 5, 1927.

ST. SURE,
U. S. District Judge.

[Endorsed]: Receipt of a copy of the within order to show cause is hereby admitted this 5th day of February, 1927.

GEO. J. HATFIELD,
U. S. Attorney.

Filed Feb. 5, 1927. [8]

[Title of Court and Cause.]

DEMURRER TO PETITION FOR WRIT OF HABEAS CORPUS.

Comes now the respondent, John D. Nagle, Commissioner of Immigration at the Port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the hearing of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

GEO. J. HATFIELD,
United States Attorney,
By R. M. LYMAN, Jr.,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Apr. 2, 1927. [9]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 2d day of April, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

No. 19,212.

In the Matter of LOW FOOK YUNG, on Habeas Corpus.

MINUTES OF COURT — APRIL 2, 1927 — ORDER SUBMITTING CAUSE.

This matter came on regularly for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. R. M. Lyman, Jr., Esq., Asst. U. S. Atty., was present for and on behalf of respondent, and filed demurrer to petition, and all parties consenting thereto, it is ordered that the Immigration Records be filed as respondent's exhibits and that same be considered as part of original petition. Attorney for petitioner was present. After hearing said attorneys, the Court ordered that said matter be, and the same is hereby, submitted. Odered that said petitioner have until Apr. 5, 1927, within which time to file brief. [10]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 8th day of April, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, Designated to Hold and Holding This Court.

No. 19,212.

In the Matter of LOW FOOK YUNG, etc., on Habeas Corpus.

MINUTES OF COURT—APRIL 8, 1927—ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS.

Ordered that the petition for writ of habeas corpus herein be and the same is hereby dismissed. [11]

OPINION.

Dismissed.

208 U. S. 11; 17 Fed. (2) 153; Quon Quon Case, U. S. Sup. Ct., Feb. 21, 1927.

April 8, 1927.

BOURQUIN, J. [12]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court and to the Honorable GEORGE J. HATFIELD, United States Attorney for the Northern District of California:

You and each of you will please take notice that Lau Shee, the detained herein, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, from the order made and entered on the 8th day of April, 1927, denying the petition for a writ of habeas corpus therein.

Dated: San Francisco, April 12, 1927.

EMERY F. MITCHELL,
Attorney for Petitioner and Appellant.

[Endorsed]: Receipt of a copy of the within notice of appeal is hereby admitted this 12 day of April, 1927.

GEO. J. HATFIELD,
United States Attorney.

Filed Apr. 14, 1927. [13]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Lau Shee, the petitioner, appellant herein, and says:

That on the 8th day of April, 1927, the above-

entitled court made and entered its order denying the petition for a writ of habeas corpus, as prayed for and filed herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of error on file herewith.

WHEREFORE, this appellant prays that an appeal may be granted in her behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof.

Dated: San Francisco, April 12, 1927.

EMERY F. MITCHELL,
Attorney for Petitioner and Appellant Herein.

[Endorsed]: Receipt of a copy of the within petition for appeal is hereby admitted this 12th day of April, 1927.

GEO. J. HATFIELD,
United States Attorney.

Filed Apr. 14, 1927. [14]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Lau Shee, the appellant herein, by her attorney, Emery F. Mitchell, Esq., in connection

with her petition for an appeal herein, and assigns the following errors which she avers occurred upon the hearing of the above-entitled cause, and upon which she will reply upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

I.

That the Court erred in sustaining the demurrer and in denying the petition for a writ of habeas corpus herein.

II.

That the Court erred in holding that it had not jurisdiction to issue a writ of habeas corpus as prayed for in the petition herein.

III.

That the Court erred in not holding that the allegations contained in the petition herein for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus as prayed for in said petition.

WHEREFORE the appellant prays that the judgment and order of the United States District Court in and for the Northern District of California, made and entered herein in the office of the Clerk of the said Court on the 8th day of [15] April, 1927, sustaining the demurrer and discharging the order to show cause, and dismissing the petition for a writ of habeas corpus, be reversed, and that this cause be remanded to the lower court with instructions to discharge the said Lau Shee from custody or grant her a new trial before the

lower court by directing the issuance of the writ of habeas corpus, as prayed for in said petition.

Dated: San Francisco, April 12, 1927.

EMERY F. MITCHELL,
Attorney for Petitioner and Appellant.

[Endorsed]: Receipt of a copy of the within assignment of errors is hereby admitted this 12th day of April, 1927.

GEO. J. HATFIELD,
United States Attorney.

Filed Apr. 14, 1927. [16]

[Title of Court and Cause.]

ORDER ALLOWING PETITION FOR APPEAL.

On this, the 12th day of April, 1927, comes Lau Shee, petitioner by her attorney, Emery F. Mitchell, Esq., and having previously filed herein, did present to this Court her petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by her and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for and orders execution and remand stayed pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that pending the hearing of said case in the United States Circuit Court of Appeals for the Ninth Circuit that the detained, Lau Shee, will not be removed from the jurisdiction provided in her behalf is furnished a good and sufficient bond in amount of $500, to secure her maintenance by the United States supplied and sureties to be approved in accordance with the statutes in [17] said cases made and provided, and the rules of this Court, stipulation for cost bond in the sum of Three Hundred ($300) Dollars.

Dated: San Francisco, April 12, 1927.

BOURQUIN,
United States District Judge.

[Endorsed]: Receipt of a copy of the within order allowing petition for appeal is hereby admitted this 12th day of April, 1927.

GEO. J. HATFIELD,
United States Attorney.

Filed Apr. 14, 1927. [18]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS.

IT IS HEREBY ORDERED that the original Immigration Records of the evidence upon the hearing of the demurrer in the above-entitled matter may be transferred by the Clerk of this court and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, said transfer to be made at the time the record of appeal is certified to by this court.

Dated: San Francisco, April 12, 1927.

BOURQUIN,
United States District Judge.

[Endorsed]: Receipt of a copy of the within order is hereby admitted this 12th day of April, 1927.

GEO. J. HATFIELD,
United States Attorney.

Filed Apr. 14, 1927. [19]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 19 pages, numbered from 1 to 19, inclusive, contain a full, true and correct transcript of the records and

proceedings in the matter of Low Fook Yung, *alias,* etc., on Habeas Corpus, No. 19,212, as the same now remain on file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of seven dollars and ninety cents ($7.90), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 28th day of April, A. D. 1927.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [20]

CITATION.

United States of America,—ss.

The President of the United States, to the Commissioner of Immigration of the Port of San Francisco, Hon. JOHN D. NAGLE, and to the United States Attorney for the Northern District of California, Hon. GEORGE J. HATFIELD, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an

order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Lau Shee, also known as Low Fook Yung, also known as Ngong Fon and also known as Low Shee, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

BOURQUIN,
United States Judge. [21]

United States of America,—ss.

On this 12 day of April, in the year of our Lord one thousand nine hundred and twenty-seven, personally appeared before me, Emery F. Mitchell, the subscriber, and makes oath that he delivered a true copy of the within citation to the United States Attorney.

Subscribed and sworn to before me at San Francisco, this 12th day of April, A. D. 1927.

_____.

Receipt of a copy of the within citation is hereby admitted this 12th day of April 1927.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: Filed Apr. 14, 1927.

[Endorsed]: No. 5133. United States Circuit Court of Appeals for the Ninth Circuit. Lau Shee, also Known as Low Fook Yung, also Known as Ngong Fon, and also Known as Low Shee, Appellant, vs. John D. Nagle, as Commissioner of Immigration of the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed April 28, 1927.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

5133

No. ~~5123~~

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAU SHEE, also known as LOW FOOK YUNG, also known as NGONG FON and also known as LOW SHEE,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration of the Port of San Francisco, California,

Appellee.

11

BRIEF FOR APPELLANT

EMERY F. MITCHELL,
Attorney for Appellant.

THE RECORDER COMPANY, 693 STEVENSON ST., S. F.

No. 5123

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAU SHEE, also known as LOW FOOK YUNG, also known as NGONG FON and also known as LOW SHEE,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration of the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal from an order and judgment of the United States District Court for the Northern District of California, sustaining the demurrer which was interposed by the Government to the petition of Lau Shee for discharge on a writ of habeas corpus.

STATEMENT OF THE FACTS

Lau Shee, an alien of the Chinese race, arrived at the Port of Seattle September 1, 1923. She sought admission to the United States as the wife of an American citizen. The alien was detained at Seattle pending an investigation and hearing, and upon a satisfactory termi-

nation of such investigation and hearing the alien was landed on September 29, 1923, as the wife of an American citizen, Jew Shep.

A year later, by virtue of a warrant of arrest dated October 7, 1924, Lau Shee was charged with being in the United States in violation of section 19 of the Immigration Act of February 5, 1917. More particularly, the warrant of arrest sets forth four offenses: (1) that she secured admission to the United States by fraud; (2) that she entered by means of false and misleading statements; (3) that she had been found practicing prostitution since her entry; and (4) that she entered for an immoral purpose.

After the warrant of arrest was issued in the year 1924 nothing further was done toward granting the alien a hearing until the month of October, 1926. This hearing in the year 1926 was afforded at the instance and request of the alien.

The Immigration Department attempted to sustain the four charges set forth in the warrant of arrest by introducing into evidence:

1. A statement taken from the alien on October 7, 1924;
2. A letter signed by R. P. Bonham, District Director of Immigration at Portland, Ore., to the Commissioner of Immigration at San Francisco;
3. The Chinese files showing the entries into the United States and the departures from the United States of the alien, her husband and their child.

The Board of Review found, after an examination of this evidence, that Lau Shee had been in the United States too long to deport her on the charge that she entered the United States by means of false and misleading statements.

The Board of Review further found that there was no evidence in the record supporting the charge that the alien had been found practicing prostitution since her entry into the United States.

A warrant of deportation, however, was issued upon the grounds that Lau Shee entered the United States for an immoral purpose and that she secured admission by fraud, not having been, at the time of her entry, the wife of a member of the exempt classes.

It is the Government's contention that the fraudulent entry is proved by the fact that Lau Shee had entered the United States in 1917 as the wife of Yee Leung, an American citizen.

While the Board of Review states in its opinion that Lau Shee testified in Seattle that she had never been in the United States before, we have been unable to find a statement in the record to this effect. So far as the record shows the alien was not questioned as to whether or not she had ever been in the United States before. It is true that she did not volunteer any information upon the matter, and affirmatively represented that Jew Shep was her first husband. This, however, was embraced in the charge of entry by means of false and misleading statements, which has been dismissed.

ARGUMENT WITH POINTS AND AUTHORITIES

1. THE FINDINGS HEREIN MADE BY THE BOARD OF REVIEW AS THE BASIS FOR THE WARRANT OF DEPORTATION ARE CONTRARY TO LAW.

We are aware of the rule that where there is any evidence to sustain the finding of the departmental board,

such finding is final, and not open to review by any court. It is our contention, however, that there is no evidence in support of such findings. Directing our attention first to the charge that Lau Shee entered the United States for an immoral purpose: the evidence in the various files (particularly Lau Shee's Seattle file 405/1-6) establishes that these parties went through a marriage ceremony in China in accordance with Chinese customs; that Lau Shee believed herself free to marry at the time in question; that they lived in China as man and wife for approximately ten months; that a son, Jew Jin Ah, was born, the lawful issue of said marriage in China; that they came to the United States and entered the United States as man and wife; that they have lived together in the United States as man and wife since 1923.

In the case of *Ex parte Morel,* 292 Fed. 423, 427, the court said:

> "Sexual intercourse of the parties must be the motive and purpose of the importation, and where parties enter the United States upon the belief that they had a lawful right to sustain the relation of husband and wife they may not be regarded as within the provisions denounced by the Immigration Act . . . with relation to importation for immoral purposes, where there can be no question with relation to the good faith of the parties. . . . The primary purpose of the act is to be protected against men and women who are weak, vicious and bad. *The question under this act is not whether Morel and the woman were legally married, but the purpose of bringing the common-law wife from Vancouver to Seattle.*"

Not only by their testimony but by their actions these parties proved that they believed they had a lawful right to sustain the relation of husband and wife.

The fact that the marriage in China between these parties was not performed in accordance with British law should not affect its legality.

In the note to the case of *Greenwood* v. *Frick*, 233 Fed. 629, 632, it is said:

> "It seems well established that the presumption of the legality of a marriage and the legitimacy of children merges and destroys the presumption that a former spouse had continued alive; and that the second marriage was not ceremonial would not seem to affect the reason of the rule. (*Vreeland* v. *Vreeland*, 78 N. J. Eq. 256 and 34 L. R. A. [N. S.] 940.)"

It should be remembered that in our case neither the marriage between Lau Shee and Jew Shep nor the marriage between Lau Shee and her former husband was any more than a marriage by Chinese custom. The validity of the marriage in China of Lau Shee and Jew Shep is to be determined by the law of China.

> *Caine* v. *Johnson*, 13 Fed. (2nd) 432;
> *Ex parte Suzanna*, 295 Fed. 713.

Upon the question of whether or not a legal marriage existed, Lau Shee and her husband, Jew Shep, were examined. In addition, an attorney-at-law of this state, who knew the parties in China, testified that in his opinion the marriage ought to be recognized in the United States, and that a man and woman married in accordance with Chinese customs would be considered married in the State of California.

(See Seattle file 405/1-6 on the admission of Lau Shee at Seattle.)

Furthermore, the fact that the Board of Review found that the charge of practicing prostitution was not sus-

tained by any evidence, necessarily carries with it the concession that the conduct of the parties does not constitute the offense of "entering for an immoral purpose."

The Immigration Department, after a hearing, admitted Lau Shee as the wife of Jew Shep, and it is submitted that there is absolutely no evidence to show that the alien was not entitled to believe herself the lawful wife of Jew Shep.

Coming next to the finding by the Board of Review that the alien fraudulently entered the United States in that she was not the wife of Jew Shep at the time of entry: the obvious answer to such a contention is that a hearing and investigation was held at the time of Lau Shee's entry at Seattle. The immigration authorities were not bound to accept any of the statements made by the detained or her witnesses. There was ample time while the alien was held in custody to complete any investigation that they cared to make. The legal presumption, in the absence of any evidence to the contrary, must be that the immigration authorities properly performed the duties required of them in holding the hearing to determine Lau Shee's right to enter the United States as the wife of an American citizen. A full opportunity for inspection was afforded the Government. Lau Shee, during this inspection, made no attempt to conceal her identity, all of her names being given and the same family history related as previously testified to on her admission into the United States at the port of San Francisco (S. F. File 16210/210, September 13, 1917). This is admitted by the Government in the letter of District Director Bonham.

Having once determined that a marriage in fact was celebrated between Lau Shee and Jew Shep, the Gov-

ernment should have been bound by that determination.

The Board of Review seems to attach some significance to the fact that Lau Shee, on her first arrival in the United States, entered at the port of San Francisco, while on the occasion of her arrival in 1923 she entered at the port of Seattle. This fact, however, is entitled to no weight, for the reason that the alien and her husband repeatedly gave their ultimate destination as San Francisco. This is proven by their testimony in Seattle at the time of entry and also by the affidavit filed with the consular office in Hongkong prior to the departure for the United States.

We have already directed the court's attention to the testimony establishing the fact that a marriage was entered into in China between Lau Shee and Jew Shep. The validity of this marriage is to be determined by the laws of China. (See *Caine* v. *Johnson, supra,* and *Ex parte Suzanna, supra.*)

Section 63 of the Civil Code of the State of California provides that all marriages contracted without this state which would be valid by the laws of the country in which the same were contracted are valid in this state.

The Government seeks to attack the legal effect or validity of this marriage upon the ground that Lau Shee had previously been admitted to the United States as the wife of an American citizen, Yee Leung. It is our contention that once having established the fact of marriage between Lau Shee and Jew Shep, the burden was upon the Government to prove not only that a prior marriage had been contracted by Lau Shee, but that such prior marriage was still undissolved.

The law of California also includes the proposition that the state will recognize as valid all divorces granted

without the state which would be valid by the laws of the country in which the same are granted. The comity existing between countries necessitates that this be true.

No proof whatever was furnished by the Government to show that Lau Shee's prior marriage had not been dissolved either by a divorce from Lee Leung or by his death.

16 California Jurisprudence (page 935) states the rule of law here involved as follows:

> "The burden lies upon the one who attacks the validity of a marriage upon the ground that it was contracted while a prior marriage was in force, to show not only that the prior marriage was contracted, but that it had not at the time of the second marriage been dissolved by death of a party or by a judicial decree. (Citing cases.)"

The Supreme Court of California said, in the case of *McKibbin* v. *McKibbin,* 139 Cal. 448:

> "Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law raises a strong presumption of its legality—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of the presumption, the truth of law and the fact that it is illegal and void."

Furthermore, the Government, once having admitted the fact of marriage, the Department of Labor should not be permitted to attack its validity. The validity of the marriage between Lau Shee and Jew Shep is a legal question and one that should be determined in a court of law. As pointed out, at best the Government only relies upon suspicion in attacking the marriage validity. Under such circumstances, where a child and family

rights are concerned, it would seem that an American citizen would be entitled to have the legality of his marriage passed upon by a court rather than to have such rights determined by an administrative official unskilled in the law.

For the sake of the argument, assume that the Government is correct in its contention that the marriage between Lau Shee and Jew Shep is void by reason of Lau Shee's previous marriage with Yee Leung. Yee Leung is an American citizen, and if Lau Shee is still his wife, then it must follow that she is entitled to remain in the United States under her previous status.

There can be no immorality in Lau Shee's previous conduct with Jew Shep, for the reason that Lau Shee lived with Jew Shep as his wife and bore a child to him under the bona fide belief that she was legally his wife. Her intent at the time of entry was to live with the man whom she believed to be her husband. Consequently there could be no intent to enter the United States for an immoral purpose.

Finally, upon this point, it should be observed that there is no distinction between an entry by false and misleading statements and a fraudulent entry. A fraudulent entry is embraced within an entry by false and misleading statements as a matter of law. Consequently, when the Board of Review found that too long a time had elapsed to deport the alien for an entry by means of false and misleading statements, it also should have found that the same reasoning applied to a fraudulent entry.

2. THE HEARING AFFORDED THE ALIEN LAU SHEE WAS MANIFESTLY UNFAIR.

(1) Certain confidential reports were placed before W. W. Husband, Second Assistant Secretary of Labor, concerning Lau Shee and her husband, Jew Shep. These confidential reports were not made a part of the record herein, and consequently the alien and her attorney were denied the opportunity of examining the same and were unable to prepare any defense to refute the charges contained in the confidential reports. See letter April 17, 1926, from J. F. Dunton, Immigration Inspector at Seattle, to R. P. Bonham, District Director of Immigration at Portland, which reads as follows:

> "I am returning herewith the copies of five documents which you sent me under personal cover with your letter of February 8, 1926, No. 5030/103, and which related to the Jew Shep matter. *The copy of your confidential report* to Mr. Husband is also enclosed. The other records forwarded with your letter of January 17, 1926, are being returned through official channels."

(This letter is to be found in the Seattle file of Lau Shee, No. 405/1-6.)

In the case of *Chew Hoy Quong* v. *White, Immigration Commissioner,* 249 Fed. 869, at 870, the Circuit Court of Appeals for the Ninth Circuit, speaking through Circuit Judge Gilbert, said:

> "However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, there clearly is no warrant for basing decision, in whole or in part, on confidential communications the source, motive or contents of which are not disclosed

> to the applicant or her counsel, and where no opportunity is afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received."

See, also:

Lewis v. *Johnson*, 16 Fed. (2nd) 180.

As already pointed out, the matter contained in the confidential reports was placed before W. W. Husband, Second Assistant Secretary of Labor, and it is W. W. Husband, Second Assistant Secretary of Labor, who signed the opinion of the Board of Review which ordered Lau Shee deported to China, as well as the warrant of deportation. Such practice is manifestly unfair.

(2) The hearing was also manifestly unfair for the reason that the letter of District Director Bonham to the Commissioner of Immigration at San Francisco, and dated October 4, 1924, was introduced into evidence and made a part of the record over the alien's objection. We think that the Government will admit that the charges herein, as set forth in the warrant of arrest, were based on this letter. At least District Director Bonham, in a letter dated February 2, 1926, to the Commissioner of Immigration at San Francisco, states that he was responsible for the investigation and arrest of Lau Shee. In this letter of October 4, 1924, Bonham comes to the conclusion that the Lau Shee who entered at the port of Seattle in 1923 was the same Lau Shee who entered at the port of San Francisco in 1917; that she entered by means of false and misleading statements; that Lau Shee was not legally married; that she was brought to the United States for an immoral purpose; that he was *reliably informed* that she was a prostitute subsequent to her entry into the United States in 1917.

Although Mr. Bonham states that he was reliably informed that Lau Shee was a prostitute, an examination of the record will show that no testimony, documentary or otherwise, was introduced to substantiate this statement. In fact, Mr. Bonham failed to appear in person to testify in the matter at all. Under these circumstances this court can best judge whether or not Mr. Bonham had any information upon a charge that he makes so freely.

Counsel for the alien waived the right of cross-examination of this witness for the reason that the inspector conducting the hearing wanted to continue this case until such time as it would be convenient for Mr. Bonham to appear. This case has been pending two years in order to give Mr. Bonham an opportunity to develop his case and appear as a witness. The case was not summarily set down for hearing. The record will show that Mr. Bonham had sufficient notice of the time of the hearing to enable him to be present. It was unjust to the alien to insist that the complete hearing at the time set be conditioned on a waiver of the right of cross-examination of this witness.

It will be observed that only conclusions are stated in the letter. None of the ultimate facts or their source are stated. The alien was thus deprived of all opportunity to offer any testimony in rebuttal. The conclusion charging this alien with prostitution was enough to render the hearing manifestly unfair. A charge of prostitution is a serious matter at any time, but experience has proven that in immigration cases it is even more serious, and is tantamount to an order of deportation from the United States. The charge herein was made in 1924, the hearing on the charge was held in 1926, but

even with two years to investigate and prepare this case the Government could produce no evidence whatever of this alien having practiced prostitution. Under such circumstances the fair thing to have done would have been to dismiss the prostitution charge. However, this was not done.

(3) One of the material points in the case was whether or not the alien was free to enter into the marriage contract at the time she became the wife of Jew Shep in China. In this regard the alien testified that Yee Leung had deserted her about two years after she was landed in the United States, and had told her at that time that she was free to marry any one she wished; that she did not get a formal divorce in the United States because she was not married in accordance with the laws of this country. (See statement Lau Shee dated October 7, 1924, page 3.) It will be observed that there is no testimony in the record that Yee Leung did not obtain a divorce in the United States or in China.

Lau Shee, in the hearing afforded her under the warrant of arrest, requested that the immigration file of Yee Leung be made a part of the record herein. This record shows that on August 7, 1926, Yee Leung stated in his application for a form 430 to return to China that his second wife, Lau Shee, had left him three years before he departed for China in 1922. There then appear upon this request certain notations written in the handwriting of Immigration Inspector A. Kuchein, as follows:

> "See statement made 3-16-22, when applying for a return certificate applicant was evasive in his answer regarding the whereabouts of his second wife and contradicted himself several times regarding the time she was last seen by him."

This statement, made on March 16, 1922, by Yee Leung concerning Lau Shee, would have been material in corroborating Lau Shee's testimony that she was free to marry at the time she married Jew Shep. However, we have searched the record in vain for any such statement. Such statement is as elusive as is the testimony of Mr. Bonham in substantiation of his prostitution charge. Inasmuch as the alien subsequently requested the complete file of Yee Leung with particular reference to his arrivals and departures in and from the United States and his examinations upon application for return certificates taken before the immigration officials since 1917, she was entitled to have this evidence before the Board of Review and before this court. It was manifestly unfair to deprive the alien of the benefit of this testimony.

(4) Finally, we contend that it was manifestly unfair to postpone the hearing herein for a period of two years and burden the alien's case with the insinuations and charges against her husband, Jew Shep. If this court will examine the immigration file of Jew Shep, who is admittedly an American citizen, it will be found that his file reeks with anonymous letters, newspaper clippings and letters between various offices of the Immigration Department. In one of these letters Mr. Bonham refers to Jew Shep as an "arch scoundrel."

All these papers were clearly inadmissible so far as the case of Lau Shee was concerned, and their introduction into the record in this case was most unfair.

It is evident from even a cursory examination of this case that the purpose of instigating the proceedings herein against Lau Shee was not because of any immorality on her part, but in the hope that Jew Shep could be charged with some offense. Lau Shee's case was post-

poned two years in anticipation that some tangible evidence could be produced against her husband.

The record shows that the Government expected to obtain some information in the hearing afforded Lau Shee to use against Shep.

A motive for this persecution of Shep is found in a telegram dated October 13, 1926, from William H. Wyle to the Honorable Carl Robe White, which reads in part as follows:

> "This arrest (Lau Shee) following my refusal to wire your department (Labor) information given by me to you about conditions (immigration) Fresno was false."

CONCLUSION

In conclusion, we respectfully contend that there is no legal testimony in this record which is sufficient as a matter of law to sustain the warrant of deportation of the alien Lau Shee. When the circumstances surrounding the charge herein and the manner of conducting the hearing are considered the result is manifestly unfair.

In the case of *Ex parte Rodriquez*, 15 Fed. (2nd) 878, it is said that a warrant of deportation is the exercise of executive authority, involving grave and momentous consequences, and to support the warrant there should be a definite and clear finding which would support the act.

Consider the consequences in the instant case: it involves the right of Jew Shep, admittedly an American citizen, to have the company of his wife; it involves the right of Jew Jin Ah, a boy only four years of age, to have the care and attention of his mother, and, finally, the deportation of Lau Shee at the present time prevents her from ever returning to the United States, for the

reason that the Chinese wife of an American citizen is no longer entitled to enter this country.

Wherefore, we respectfully request that the decision of the District Court for the Northern District of California be reversed, with instructions to issue the writ of habeas corpus as prayed for.

Respectfully submitted,

EMERY F. MITCHELL,
Attorney for Appellant.

No. 5133

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LOW FOOK YUNG, alias LAU SHEE, or LAW SHEE, alias AH YOUNG, alias NGONG FON, or LOW SHEE,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration at the Port of San Francisco.

Appellee.

BRIEF FOR APPELLEE

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Attorneys for Appellee.

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Appellee.

BRIEF FOR APPELLEE

STATEMENT

This is an appeal from the order of the District Court of the Northern District of California made April 7, 1927, denying a petition for a writ of habeas corpus.

The petition for the writ sets forth that one Low

Fook Yung is detained by the Commissioner of Immigration for the Port of San Francisco upon a warrant in deportation proceedings, it being contended that the deportation proceedings theretofore had were invalid in that there was not legal evidence tending to support the warrant of deportation. Further contentions are: that a letter of one Bonham having been introduced in evidence, he was not produced for cross examination; that hearsay evidence was received, and that appellant was deported "without due process of law."

It is further set forth in the petition that it is stipulated that the copy of the proceedings before the Secretary of Labor brought into court and produced according to custom may be considered a part of the petition with the same effect as if filed therewith. At the hearing on the demurrer to the petition, the said records were produced, and filed as exhibits and have been brought to this court by appellant. These records are the following: Exhibit "A": the record of the *deportation* proceedings against *appellant;* Exhibit "B": the record of proceedings before the immigration bureau had on the application of *appellant* at San Francisco for *entry* in May, *1917*; Exhibit "C": the record upon the application of one *Jew Shep* for certificate made at Fresno in 1922, and other proceedings, including proceedings had on his return in 1923; Exhibit "D": the record of the proceedings before the Immigration Department at *Seattle* on the application for *entry* of *appellant* at that Port in September, 1923; Exhibit "E": the record of proceedings had in regard to several de-

partures and entries into the United States of one *Yee Leung,* the husband of appellant; Exhibit "F": the record of the proceedings before the immigration authorities in regard to the departures and returns to the United States at various times by *Jew Shep;* Exhibit "G": the record of the proceedings on application for entry of one *Jew Jin Ah,* as the infant son of appellant made at Seattle in 1923.

From these exhibits it is seen that one Yee Leung of the Chinese race was born at San Francisco in February, 1879, and was thus an American citizen; that he visited China in April, 1906, returning in September, 1907. (Ex. "E" 52) On the first trip to China, Lee Leung married one Ng Shee June 25, 1906. (Ex. "B" 29) There was one son born—Yee Ting, May 19, 1907. This wife died February 22, 1916. (Ex. "C" 28, 20) Yee Leung thereupon married appellant Lau Shee at Hongkong on September 5, 1916. (Ex. "C" 28) This marriage had the necessary formality. (Ex. "C" 14) Following this marriage Yee Leung and appellant came to the United States, arriving at San Francisco May 26, 1917. (Ex. "C" 5) She was denied entry by the local authorities but an appeal to the Secretary was sustained, which resulted in her admission (Ex. "B" 69, 74) Appellant deserted Yee Leung about 1919, a couple of years after her entry. (Ex. "E" 52) Later in 1922 Yee Leung obtained necessary papers for another visit to China, returning in April, 1923. (Ex. "E" 52)

In August, 1923, one William Jew Shep made affidavit before the American Consulate at Victoria, Hong-

kong, setting forth that he was a citizen of the United States; and that he had departed from San Francisco October 18, 1922, "for the purpose of attending to commercial matters and become married." On or about September 1, 1923, the said Shep, accompanied by appellant as Low Shee, and a minor son arrived at Seattle and applied for entry. Thereupon an inquiry was had before a Board of Special Inquiry at Seattle on September 7, 1922, wherein Low Shee was examined and testified among other things that she was born in Sar Gow Village, Sun Duk District; that she had lived in Sar Gow up to the time of her marriage; that she went up to Canton City and lived there three months before marriage. (Ex. "D" 19) Witness thereupon identifies material photographs. She said she was married to the said Shep at Hongkong, November 19, 1922, "according to the new way." (Ex. "D" 18) She thereupon identified a photograph of the said William Jew Shep, asked whom the photograph represents said "my husband." Asked "is this man your *first* husband?," answered "yes." (Ex. "D" 18) Further asked, "Were you ever married by any other custom than the new Chinese custom? A. No." Asked again about the ceremony she said, "My husband was living in the Sam Sui Bow, a place across from Hongkong where I was living. I took a boat and went across to Hongkong. My husband drove an automobile to the landing to meet me, then I went in the automobile to his house. There was no minister, just Chinese there. There was no particular ceremony, just the Chinese and the man who arranged the marriage affair." (Ex. "D" 17)

The said Shep testifying as to the same incident said:

"Q. By what custom are you married to Low Shee?

A. Half the old Chinese way and half the new way."

He said that there was no ceremoney of worshiping the ancestors at any time. Asked if he had a Chinese red marriage paper, said, "Yes, but not a regular red marriage paper, just a small piece, that is because I was married a second time." (Ex. "D" 11) Testifying further,

"Q. You got married in British territory, didn't you?

A. Yes.

Q. Why didn't you get married according to some custom that was recognized by British authorities?

A. The British really have no law that requires Chinese under their custom and besides it takes a lot of money to get a license from the British Government, so I didn't do it.

Q. Do you mean to say the British Government recognizes this marriage between Chinese without any law at all, not even a Chinese ceremony?

A. I don't know about that. A lot of Chinese get married under British custom.

Q. Why didn't you find out something? You appear to be a pretty intelligent man, making $10,000 a year?

A. Yes. I am an American citizen. I try to get this Mr. King to make out our marriage license and on account of Mr. Wylie coming back to this country and I help him to arrange his things, I didn't have time to."

Asked why he didn't go to the American Consul's office at Hongkong and ask for information, he said at

the time of his marriage he didn't know how to get to the Consul's. (Ex. "D" 7) Asked further,

> "Did you or your wife ever participate in any Chinese ceremony any place?
> A. According to the Chinese the second marriage they don't go much by Chinese custom.
> Q. They just go along and pick a woman anywhere in an automobile, take them home for a cup of tea, and that is all there is to it?
> A. Not exactly that, but we have a small Chinese red paper and there is a man who arranged our marriage affair." (Ex. "D" 7)

It will thus be noted that at the Seattle hearing in 1923 appellant stated that *Shep* then with her was her *first* husband and she inferentially stated that she had never been in the United States before when she deposed that she had *from her birth always lived in her native village up to three* months before her marriage with Shep at Hongkong in November, 1922. (Ex. "D" 19) The result of this inquiry was that the Immigration authorities at Seattle, believing the statements of appellant, admitted her as the wife of *Shep.*

Later, it having come to the attention of the immigration authorities that appellant was the same person as the *Lau Shee* who had formerly been admitted at San Francisco as the wife of *Yee Leung,* the instant deportation proceedings were commenced.

In these proceedings Lau Shee gave a statement (Ex. "A" 37) and testified that she was born in Sar Gow Village, Sun Duk District, China. She thereupon identified as her photograph the photograph attached to the affidavit executed by Yee Leung in 1917, and

identified the photograph as Yee Leung, whom she called Yee Ah Hoy, whom she called her former husband. She admitted she landed with him at San Francisco in 1917. She said that she lived with him between one and a half and two years after landing, "then lost sight of him completely, after which she returned to China." Asked if she was in Fresno in 1921, she at first denied it, then said she remembered submitting a form to the Fresno Office four years ago; asked of her husband Yee Leung, said she saw him a little over two years or a year ago in a Japanese Hotel in San Francisco. Altering the statement said she last saw him a year or two after her admission to the United States. She further said,

"Q. How do you explain your alleged marriage to Jue Shep when you have a husband Yee Leung?
A. Because Yee Leung didn't want me any more.
Q. He just picked up and left you, did he?
A. Yes.
Q. The last information you had, was he living in the United States or China?
A. I last heard that he had returned to China.

(Ex. "A" 36)

Asked further,

"Q. Were you the lawful wife of Yee Leung when he brought you to the United States?
A. Yes.
Q. Are you still the lawful wife of Yee Leung?
A. No, because the marriage relations were severed because we were married in China and he deserted me while we were in the United States, therefore I do not consider myself as his wife.
Q. Is that the only reason you have for not considering yourself as his wife?

A. Yes. Because when he left me he told me that I was entirely out of his control and I was free to marry any one I wished.

Q. Why did you testify on your return to Seattle in September, 1923, with Jew Shep that you had never been married before?

A. I didn't make any mention of it because he had given me up.

Q. You were asked by the Immigration Officers, as the records show, if you were ever married before and you answered 'no.' Is that a falsehood?

A. I told an untruth.

* * * *

Q. Did you ever secure a divorce from Yee Leung?

A. No, because we were not married by a consular officer, and there was no divorce to be had.

Q. Why didn't you get a divorce from him in the United States?

A. Because we were not married according to the laws of this country." (Ex. "A" 35)

She admitted that prior to her departure from China in 1922, while Jew Shep acted as an interpreter at the Fresno Office, she knew him. That he didn't know she was a married woman until he interpreted for her at the Fresno Office; that he knew it long before he and applicant went to China. (Ex. "A" 34) She stated that she had married Yee Leung some place in Hongkong. (Ex. "A" 33)

"Q. You claimed that you had never been married before, you don't assert that to be a fact do you?

A. I did not relate on any matters before I returned to China.

Q. You were asked whether you had ever been married before?

A. Yes.

Q. What did you tell them at Seattle?
A. I said I had not been married before."

Asked why she went to Seattle instead of San Francisco, she said that on account of the infant she saved ten days at sea. She admitted that Shep when interpreting knew that applicant was Lee Yeung's wife. (Ex. "A" 32) At the hearing before the Board of Special Inquiry in the Deportation proceedings this statement was put in evidence. The following is a transcript of a part of the proceedings in the final hearing, showing the status of the case:

"BY EXAMINING INSPECTOR TO ATTORNEY E. F. MITCHELL:

Q. Will you represent the Chinese alien, Lau Shee before this Service? A. Yes.

Q. And have you entered an appearance in writing? A. Yes.

NOTE: The following letter dated Nov. 4, 1926, addressed to the Commissioner of Immigration, San Francisco, Calif., from Attorney Herbert F. Chamberlain: 'I hereby consent to the substitution of Emery F. Mitchell in my place and stead as attorney for LAU SHEE in the matters now pending before the Department.'

Q. Are you willing and ready to proceed with the hearing? A. Yes.

BY EXAMINING INSPECTOR TO ALIEN AND ATTORNEY:

Q. Do you fully understand the nature of these proceedings? (Attorney) Yes. (Alien) I do not understand.

TO ATTORNEY MITCHELL:

Q. Do you wish the interpreter to explain more fully the nature of the charges contained in the war-

rant of arrest to the alien? A. No, I do not think it is necessary.

TO THE ALIEN BY EXAMINING INSPECTOR THRU THE CHINESE INTERPRETER:

Q. Are you the same Lau Shee who made a sworn statement before an inspector of this Service in San Francisco, October 7th, 1924? A. Yes.

TO THE ATTORNEY:

Q. Do you wish the statement read to the alien by the interpreter? A. No, I waive the reading of the statement, and object to its introduction into the record as its part of the case upon the grounds that at the time, that she was not represented by counsel, nor advised of her right to be so represented.

BY EXAMINING INSPECTOR TO THE ATTORNEY:

You are advised that the statement referred to is introduced in and made a part of the record, and any reason or objection you have to its introduction into the record, should be discussed in your brief in the case. There is also incorporated in and made a part of the record, report of R. P. Bonham, District Director of Immigration, Portland, Oregon, dated October 6th, 1924.

BY ATTORNEY MITCHELL:

For the purpose of protection of the record, I object to the introduction of this letter into the evidence upon the grounds that we have not been afforded the right to cross-examination of Inspector Bonham and hereby demand that he be produced if this letter is made a part of the record over our objections.

BY EXAMINING INSPECTOR BORDEN:

Under the Immigration Regulations, your objections will be made a part of the record, but the reasons therefore must be stated in your brief. At this time I wish to introduce as exhibits in this case, Se-

attle file No. 405/1-5 covering the admission of Jew Shep at that port on the President Jackson, Sept. 1, 1923; Seattle file No. 4-5/1-6 covering admission of Low Shee, admitted Sept. 29, 1923 and Seattle file No. 405/1-7 covering admission of Jew Jim Ah at Seattle, Sept. 29, 1923; San Francisco file No. 16210/2-10, covering admission of Lau Shee at San Francisco, Sept. 13, 1917, ex S.S. Korea Maru; San Francisco file No. 12017/24300 covering entries and departures of Jew Shep.

TO THE ATTORNEY:

Q. Do you wish to introduce any evidence on any testimony in the case? A. If Inspector Bonham's letter is considered a part of the record, naturally we want the benefit of cross-examination of this witness as to matters purported and set forth in his letter of October 6th, 1924. We also ask that the complete file of Yee Leung be made and considered a part of the record herein. Lee Young being the alleged former Husband of Lau Shee; particular reference is made to the arrivals and departures of this alien into the United States, and his examination upon application for return certificates taken before the immigration officials since 1917. In view of the fact that the letter of October 6th, 1924, of Inspector Bonham is based upon heresay testimony and information which is not a part of the record, we waive our right to cross examine said inspector as to subject matters contained therein.

Q. Have you anything further to present? A. Nothing other than our brief in the matter. Of course there is no evidence of any prostitution or immoral acts contained in the record, and we ask a week to submit briefs in the matter. I wish to have the record covering Yee Leung at the San Francisco office for purpose of examination before writing the brief herein, and would like a week after the receipt of this record to submit our briefs.

It is understood that the case stands submitted." (Ex. "A" 40)

Having heard the case, the view of the Board of Inquiry was stated in the following summary:

"12020/6392

November 30, 1926.

SUMMARY: The alien, LAU SHEE, age 27 years, female, native and citizen of China, of the Chinese race, last entered the United States, September 19, 1923, at Seattle, Washington, on the SS PRESIDENT JACKSON as the alleged wife of one WILLIAM JEW SHEP, a P. L. native.

On November 5th, last, the alien was granted a hearing on warrant of arrest 55387/352 in which it is charged that she has been found in the United States in violation of Rule 9, Chinese Rules and of the Supreme Court decision on which such rule is based; having secured admission by fraud, not having been at the time of her entry, the wife of a member of the exempt classes; that she entered the United States for an immoral purpose; that she has been found practicing prostitution after entry and that she entered by means of false and misleading statements.

There is no evidence in the record to sustain the charge that she practiced prostitution after her entry and the time has expired on the charge covered by the code word 'falsetto.'

This alien, LAU SHEE first came to the United States, May 26, 1917, and was admitted as the wife of YEE LEUNG, a P. L. Native (see file 12017/29978). The record shows that they separated about two years after entry and that LAU SHEE went to work at a restaurant in Fresno, California, partly owned by William Jew Shep. Later she and JEW SHEP went to China presumably on different dates and on November 19, 1922, she claims to have married JEW SHEP in China according to Chinese custom. The record shows that LAU SHEE has never been divorced from YEE LEUNG and therefore could not have been the lawful wife of JEW

SHEP when they arrived at Seattle on the SS PRESIDENT JACKSON, September 9, 1923.

RECOMMENDATION:

In my opinion the record clearly shows that LAU SHEE is in the United States in violation of Rule 9, Chinese Rules and the Supreme Court decision on which such rule is based, having gained admission by fraud, not having been at the time of her entry the wife of a member of the exempt classes; and that she entered the United States for an immoral purpose, and it is recommended that she be deported." (Ex. "A" 38)

Following the order of the Board of Special Inquiry an appeal was taken to the Secretary of Labor and the matter coming before the Board of Review, it gave the following opinion, which was approved by the Secretary:

"55,387/352 San Francisco January 6, 1927

In re: LAU SHEE or LAW SHEE, alias AH YOUNG, alias NGONG FON, Aged about 27, Native and citizen of China, Chinese race, entered as the wife of a native at Seattle, Washington, ex ss 'President Jackson,' September 1, 1923.

This case comes before the Board of Review in warrant proceedings, it being charged that Lau Shee has been found within the United States in violation of Rule 9, Chinese Rules, and of the Supreme Court decision on which such Rule is based, having secured admission by fraud, not having been at the time of her entry the wife of a member of the exempt classes; that she entered the United States for an immoral purpose; that she has been found practicing prostitution after her entry; and that she entered by means of false and misleading statements thereby entering without inspection.

No local counsel. Attorney Emery F. Mitchell represents the defendant at San Francisco. Mr. Wil-

liam H. Wylie, of San Diego, formerly represented her.

Lau Shee has now been in the United States too long to deport her on the charge that she entered by means of false and misleading statements thereby entering without inspection. There is no evidence in the record supporting the charge that she has been found practicing prostitution after her entry. The fact is, however, and she admits it, that she was admitted to the United States in 1917 as the wife of one YEE LEUNG, an alleged citizen of this country. She claims to have lived with him for about two years, and says that he left her. After working in this country for a time, she returned to China. She claims to have regarded herself as separated from her former husband and free to marry. She returned to the United States in 1923 as the wife of one William Jew Shep, alias Jew Shu Mon, who is conceded to be a citizen of the United States. The later admission was through the port of Seattle, whereas she was previously landed at San Francisco. At Seattle she testified that she had never been in the United States before, and was admitted without her identity as the woman who had been admitted at San Francisco as the wife of Yee Leung being known. There is no reason for supposing that Yee Leung is dead, and no such claim is made. Furthermore, Lau Shee makes no claim that she was divorced in accord with American law while in this country, nor is any claim made that a formal divorce was obtained in China.

The charge that she entered the United States for an immoral purpose is, therefore, sustained as is also the charge that she has been found within the United States in violation of Rule 9, Chinese Rules, under the Supreme Court decision on which such Rule is based, having secured admission by fraud, not having been at the time of her entry, the wife of a member of the exempt classes.

It is recommended that Lau Shee, alias Ah Young, alias Ngong Fon, be deported to China at the ex-

pense of the steamship company responsible for bringing her to this country in 1923.

W. N. SMELSER,
Chairman, Secy. & Comr.

WCW/ws

So Ordered:
W. W. HUSBAND,
Second Assistant Secretary."

The grounds stated in the *warrant of deportation* which followed such decision were not so broad as the grounds stated in the original *warrant of arrest.* In the warrant of deportation dated January 20, 1927, it is recited as grounds for deportation the following: (Ex. "A" 44)

"WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector T. E. Borden, held at San Francisco, California,

I have become satisfied that the alien

LOW FOON YONG alias LAU SHEE or LAW SHEE alias AH YOUNG alias NGONG FON or LOW SHEE

who landed at the port of Seattle, Wash., ex SS 'President Jackson,' on the 1st day of September, 1923, is subject to be returned to the country whence she came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, The Chinese-exclusion Law, in that she has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry, the wife of a member of the exempt classes, and

WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector T. E. Borden, held at San Francisco, California, I have be-

come satisfied that the said alien has been found in the United States in violation of the immigration act of February 5, 1917, in that:

She entered the United States for an immoral purpose."

The assignments of error (R. 14) are three in number and amount to no more than that the court erred: in sustaining the demurrer to the petition; in not holding that the petition was sufficient, and in holding that it had no jurisdiction to issue the writ. It may be said that it made no holding of such want of jurisdiction.

In the brief of counsel four points are made in the argument:

(1) That findings by the board of review as the basis for the warrant of deportation are contrary to law; and herein it is urged that a marriage was shown between appellant and Jew Shep; that it was not shown to be invalid; that the immigration authorities at Seattle having found such marriage as a fact, the government is now bound;

(2) The hearing was unfair and herein certain specifications of such unfairness are discussed;

(a) That a confidential report was placed before the Secretary of Labor and not made a part of the record, being a certain letter from one Dunton to one Bonham;

(b) That there was introduced in evidence the letter or report of Bonham to the Commissioner of Immigration at San Francisco regarding the case;

(c) That a certain statement referred to in certain notations made on the Immigration Record of Yee Leung was not produced;

(d) That it was unfair to postpone the hearing of the charge for two years.

We shall show that,

(a) There was ample evidence which could have been accepted by the Board of Inquiry showing that the alleged marriage of appellant to Jew Shep would have been bigamous and thus wholly invalid;

(b) The hearing was not unfair in the respects urged, and that as to contentions (2 a), (2 c), and (2 d) hereinabove there is no warrant therefor in the petition for writ of *habeas corpus;* such grounds were not then urged.

ARGUMENT

I

The Secretary of Labor was authorized to find from evidence that appellant entered the United States for an immoral purpose —to maintain a relationship with one Shep which would have been concubinage.

From the references to the statement of appellant and to the immigration records put in evidence, it is seen that appellant in 1916 entered into a valid marriage at the British Colony of Hongkong with one Yee Leung, held to be an American citizen; that she came to the United States with Yee Leung, arriving at the Port of San Francisco early in 1917; that she was not admitted as such wife of an American citizen until after proceedings taken before a Board of Special Inquiry, which were finally passed upon by the Secretary of Commerce and Labor; that a couple of years thereafter she parted from Yee Leung. She says he deserted her (Ex. "A" 36). He states that she deserted him (Ex. "E" 52). The Board could have taken either view but, in any event, they simply separated without more. (Ex. "A" 36, 35.)

In 1921 or 1922 she became acquainted with Jew Shep, also claimed to be an American citizen, and within a short time it came to his knowledge that she was the wife of Yee Leung. (Ex. "A" 34.) The two parties departed for China separately. In November, 1922, at the same British Colony of Hongkong, they assumed some pretended relationship of marriage. From the accounts hereinabove given, it is likely that there was

little, if any ceremony; that there was little more than the assumption of such relationship. Whether upon the theory of a common law marriage the transaction would have been sufficient to constitute a marriage between the parties, if free to marry, need not be considered. For whatever the foreign marriage may have been, it is clear that on account of the previous marriage of the woman the marriage would have been bigamous; that it would thus not be recognized in this country, and the immigration authorities were not bound to believe that it was assumed in good faith. The Board similarly could have concluded from the evidence that the relationship following to be assumed in this country would have been the ordinary relationship of concubinage.

That Yee Leung was then living is amply established from the recital of his immigration record. (Exhibit "E" 53, 52.) Thus he is shown to have applied for a certificate under Form 430 as a prelude to a visit to China at a later date, his photograph being attached attested by his signature so as to show conclusive proof of identity, and that at a still later date he returned from China. (Ex. "E" 52.)

There is no pretense on the part of Law Shee that she was ever divorced. She expressly denied that she was divorced (Ex. "A" 35), and if she was deserted as she pretends (Ex. "A" 36), she alone could have obtained the divorce. She makes no reference to any divorce having been obtained by her husband, although she was being questioned as to reasons as to why she could have pretended the second marriage was valid, the first having been entered into. The entire lack of

such divorce may have been inferred from her examination when she gave her statement October 7, 1924. (Ex. "A" 36, 35.) Bilokumsky v. Tod, 263 U.S.149,154

Upon such a state of the record the several principles of the law which would support the ruling of the immigration authorities are really beyond dispute.

(a) Thus it is settled, in fact it is conceded, that the decision of the immigration authorities upon such questions of fact, there being evidence to support it, are not to be reviewed upon *habeas corpus* proceedings. We need no more than cite in passing a couple of authorities to such effect.

In the case of

Lee Loy vs. *Nagle,* 15 F. (2d) 50

the court said:

> "To justify a review by the court, there must be something more than 'the basis of a dispute.' *Tulsidas* vs. *Insular Collector of Customs,* 269 U. S. 258, 43 S. Ct. 586, 67 L. Ed. 969. After taking the evidence all together, the department found the right to enter not sustained; if there is any evidence, the court cannot interfere, *Jeung Bock Hong* vs. *White,* 256 F. 23, 189 C. C. A. 161. Nor can the court go into the insufficiency of the probative facts. *White* vs. *Young Yan* (C. C. A.) 278 F. 619. Nor is the department required ' . . . to point out in detail every discrepancy in the testimony and every defect in the proof that might give rise to a doubt.' *Dea Hong* vs. *Nagle* (C. C. A.), 300 F. 727, at page 729."

In the case of

Chin Yow vs. *United States,* 208 U. S. 8, 13,

which was that of an applicant for admission who

claimed to have been born in the United States, the Supreme Court said:

> "But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

(b) That for a man to bring a woman or for a woman to come to the United States to assume a relationship which would be not marriage but concubinage is such immoral conduct as to authorize the deportation under the immigration act of the guilty party. This application of the provisions of the statute is equally well established.

Thus in the case of

> *U. S. ex rel Femina* vs. *Curran*, 12 Fed. (2d) 639, 640.

it was said:

> "Result is that, if this realtor did bring into this country Mrs. Faccio for the purpose of retaining her as, or making her, his mistress, is subject to deportation."

In

> *United States* vs. *Bitty*, 208 U. S. 293, 52 L. Ed. 543, 547,

it is said:

> "Guided by these considerations and rules, we must hold that Congress intended by the words 'or for any other immoral purpose,' to include the case of anyone who imported into the United States an

> alien woman that she might live with him as his concubine. The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the importation of an alien woman brought here only that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose."

And in the recent case before this court

> *Kostenowczyk* vs. *Nagle*, No. 4975 (decided April 18, 1927)

upon the authority of the two cases cited the court applied the same principle. In the latter case the court said of Kostenowczyk:

> "Petitioner well knew that his marriage was in force and that it was a complete obstacle to marriage with another woman."

In that case there was a contention that there was a common law marriage in Siberia previous to the coming to the United States. The contention was held not well founded among other reasons for the reason given that it would be bigamous.

So in the instant case, the appellant Lau Shee well knew that she had been previously married to another and without waiting for such marriage to be dissolved either by death or divorce, or in any other manner, recklessly and wilfully assumed the irregular relationship with the party Shep; she certainly knew that the marriage would

be bigamous and in all civilized countries invalid. She was an adult in her full senses and could not have believed the contrary. If she were to protest her good faith the immigratioin authorities would not be bound under the facts to believe such protestation; it must be taken as a fact that the marriage was not in good faith. The reasons given by her that Yee Leung had left her, telling her in effect that she could do as she pleased, could not be taken as other than trivial.

That she was then the wife of another would prevent her marriage to Shep regardless of what might have been the law in Hongkong. This fact will serve to differentiate the two cases cited by counsel on the point; the cases of *Kane* vs. *Johnson*, 13 Fed. (2d) 432, and *ex parte Suzanna*, 295 Fed. 713. These cases were cited upon the proposition that a marriage valid in the country where executed would be deemed to be valid here. But it will be noted that the statement of the principle contains (p. 717) the well established exception that it is

> "only provided that it is not celebrated between two persons who are not too nearly related to each other or between two persons, *one of whom had a wife or husband still living*. See cases cited above."

Were it otherwise courts in civilized countries would be compelled at times to recognize plural marriages. The authorities are all to the contrary.

Moreover, although the second alleged marriage took place out of this State, there was later, as the parties intended, cohabitation within this State, and under

Section 1106 of the Penal Code of California it is provided,

> "Sec. 1106. Evidence on a trial for bigamy. Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; *and when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge.*" (Italics added.)

Accordingly, the first marriage being undissolved and the proof clear that the parties cohabitated in this state, to assume that they really married at Hongkong would be to assume that they committed a grave felony. Upon such principle the Department may well have inferred that there was no pretense of a marriage in Hongkong but that there was a mere assumption of an irregular relationship.

(d) Authorities are cited in support of the contention that from the presumption of the legality of a marriage, there is to be inferred the dissolution of a previous marriage either by death or divorce, and that the burden is on one who attacks the subsequent marriage to show that the first remained undissolved, but it is very clear that such presumption cannot avail appellant here for the reason as we have pointed out, the government expressly excluded the case of the death of Yee Leung. Thus he is shown to be living by his execution of an application to depart from the United States made on July 30, 1926, accompanied by his photo-

graph and attested by his signature. (Ex. "E" 53.) That he was alive later than the alleged marriage of appellant to Shep in Hongkong is shown by various recitals of Exhibit "E." That the marriage was not dissolved by judicial decree is shown from the statement of petitioner given on October 7, 1924, (Ex. "A" 37, *et seq.*) especially the excerpts hereinabove referred to.

There would be no room for the invocation of the presumption referred to for the reason that appellant appeared and testified on the subject, expressly denied that she obtained a divorce and, asked for her reasons for assuming that she was free to marry in spite of her former marriage, did not claim the death of Yee Leung or that she believed that he was dead; she did not claim any divorce, but on the contrary, gave as such reason that he "picked up and left her" and merely told her she could do as she pleased. The bigamous character of any pretended marriage to Shep is thus conclusively proven. *A fortiori* the immigration authorities could have inferred it as a fact from the proofs before them.

Nor is it pertinent that the woman might have obtained a divorce and then married Shep and that her relationship then would have been regular and her visit to the United States not subject to any imputation of immorality. It is sufficient to say that she did not do so, but, on the contrary, flaunted the laws of the United States. In any other such situation it might be wondered why the parties involved did not procure a divorce rather than commit some grave crime, but it is not held that the potentiality of divorce would be at

all considered as a defense or excuse. Appellant from her foreign or Chinese nationality would not be weighed in a different scale from that of an ordinary white woman, a citizen of the United States, who in defiance of a former marriage without a pretense of divorce assumes an irregular relationship.

The case of *Ex parte Morel,* 292 Fed. 423, is cited but that case is easily distinguishable from the instant case. There two citizens of France, perfectly free to marry and contemplating marriage, being in the State of California entered into what would have been a common law marriage but for the enactment of a recent California Statute. It is shown that the acts would have constituted a marriage in France, the law of which they were familiar. It indeed would have been a marriage in any common law jurisdiction in most States of the Union. Later they made a trip to Canada and returned. Still later, doubting the validity of the first marriage, they separated, whereupon the deportation proceeding against the man was instituted. The Circuit Court of Appeals of the Second Circuit (270 Fed. 577) seems to have sustained the deportation. But in the case cited, the District Court at Seattle, finding that the alleged marriage was in good faith, finding further that during the sojourn in Canada there was in fact a common law marriage relationship assumed, held that there was not an importation for an immoral purpose, the court emphasizing the purpose of good faith in that the parties competent to marry believed themselves married. Here, as we have seen, the parties were not competent to marry, could not in good faith have believed

themselves married, but, as in any other similar case, they were simply flaunting the law.

II.

The hearing was not unfair for any of the particulars referred to.

(a) *Complaint is made of the receipt in evidence of the initial report of Inspector Bonham,* constituting page 3 of Exhibit "A," and complaint is further made that he was not produced for cross-examination.

It may be noted that this report, as far as any reference was made to alleged prostitution, could not be prejudicial for the reason that there was found there was no prostitution; as to the remainder of the report, it was substantially to the effect that from an examination of immigration records the identity of Lau Shee as the same person who married Yee Leung was stated. But since this is freely admitted, and completely shown by the records subsequently put in evidence, the matter could have been of no importance. As far as any cross-examination of Bonham is concerned, that was expressly waived, as will be seen from the excerpt from page 40 of Exhibit "A" hereinabove set forth.

But there could not be any objection taken to the character of this evidence, since it is well established that a hearing does not cease to be fair merely because rules of evidence or procedure applicable in judicial proceedings have not been strictly followed by the ad-

ministrative officers or because some evidence has been improperly received or rejected.

U. S. vs. *Tod,* 263 U. S. 149.

Tang Tun vs. *Edsell,* 223 U. S. 673, 681.

In the case of *United States* vs. *Curran,* 12 F. (2nd), 636, *supra,* it was said:

> "It is now long established, in proceedings in immigration cases, that neither the hearsay rule nor the best evidence rule, nor, indeed, any of the common-law rules of evidence, need be observed. A board of special inquiry, which determines these cases, may consider heresay evidence and administrative findings, although based upon evidence which would not be competent in a court of law, which evidence may not be attacked upon habeas corpus. *United States ex rel. Diamond* vs. *Uhl* (C. C. A.) 266 F. 34; *Morrell* vs. *Baker* (C. C. A.) 270 F. 577. The weight to be given to such documents as were admitted, relating to the genuineness of the alien's visas, was for the board's determination."

That the immigration records put in evidence were properly so received and have probative value is, of course well established.

Chang Sim vs. *White,* 277 Fed. 765;

In re Jem Yuen, 188 Fed. 350;

White vs. *Chan Wy Sheung,* 270 Fed. 764;

Chin Shee vs. *White,* 273 Fed. 801;

Soo Hoo Hung et al. vs. *Nagle,* 3 F. (2d) 267.

In the case last noted it was said:

> "Appellants say that the files in the case of Soo Hoo Jin, an alleged son of Soo Hoo Hing, who was

> deported, though considered in the decision of the applications under consideration, were never brought to the attention of the applicants. The record refutes the contention by showing that the entire record was given to the attorney for these applicants, and that he later returned certain exhibits, which included the files and the exhibit, which it is now said were not brought to the attention of the applicants."

And such records were so considered here.

(b) *The hearing was not unfair for anything indicated in the letter of Dutton to Bonham,* dated April 17, 1926.

This letter from one official to another is found in the Seattle file of Lau Shee. It is merely an incidental reference to some confidential report to an official of the Immigration Bureau at Washington, the contents of the report or that it cut any figure in the instant case is not otherwise indicated. The Exhibit "A" contains the entire proceedings had in regard to the present warrant of deportation. Certain collections of papers constituting individual immigration records were put in evidence in connection therewith, the Lau Shee Seattle file Number 405/1-6 included. But since that file or any of the other files does not contain the alleged confidential report, nor was it shown to have been received by the Immigration Department, or in the Department's proceedings it seems to us to be entirely without the case. As far as it appears, it was originally made in some collateral proceeding and would have no more relevancy than any other record of the voluminous records of the Department of Labor.

Moreover, this particular specification was not made

in the petition for writ of *habeas corpus* as a ground thereof, and for that reason alone would not be considered.

Dea Hong vs. *Nagle,* 300 F. 727;
Ex parte Yoshimasa Nomura, 297 F. 191.

(c) *There is no unfairness shown in respect to an alleged statement of Inspector Kuchein* found in the Immigration file of Yee Leung referring to a statement made 3-16-22 in applying for a return certificate said to be evasive.

It appears that appellant now claims that such statement should have been placed before the Immigration Bureau in the instant case. It is sufficient to say that the record does not at any place show any request by appellant for the production or introduction in evidence of the statement, nor that the matter would be important or relevant in the present inquiry. Had it been excluded it would be a mere case of a rejection of evidence and would not upon the authorities hereinabove cited have rendered the hearing unfair.

Moreover, as indicated in the preceding paragraph, this contention was not made in the petition for writ of habeas corpus and cannot now be considered.

Dea Hong vs. *Nagle, supra* 300 F. 727;
Ex parte Yoshimasa Nomura, 297 F. 191.

(d) *It is finally contended that the hearing is unfair for the delay of two years between* the issuance of the warrant of arrest and the final hearing.

It does not appear that any such delay prejudiced

appellant. She was at large on bail, going her way, and, no doubt, was entirely willing to have the proceedings drawn out knowing that delay would make for her rather than against her in assembling evidence. It is not shown that any particular demand for hearing was made until just before one was accorded, or that the delay was not according to her desires. See

Seif vs. *Nagle*, 14 F. (2d) 416.

STATUTE INVOLVED.

The deportation of the appellant from the United States has full statutory basis. Thus it is provided in Section 3 of the Immigration Act of February 5, 1917, 39 Stat. 875, U. S. Compiled Statutes, Section 4289¼b, as follows:

> "The following classes of aliens shall be excluded from admission into the United States; * * * persons coming into the United States for the purpose of prostitution or *for any other immoral purpose* * * *."

And Section 4 of the same Act provides:

> "The importation into the United States of any alien for the purpose of prostitution *or for any other immoral* purpose is hereby forbidden * * *." (Italics added.)

And Section 19 of the same Act provides for the deportation within five years after entry of any alien who at the time of entry was a member of one or more of the classes excluded by law or an alien who shall have entered or who shall be found in the United States in

violation of this Act or in violation of any other law of the United States.

The appellant would also be deportable under the provisions of that Act as being in the United States in violation of the Chinese Exclusion Acts. She is shown to be an alien of Chinese birth and not admissible under any of the exceptions, especially she is shown not to have been admissible under Rule 9 as she claims, as being the wife of an American citizen, her proof in that behalf being fraudulent.

It will be noted that the exclusion in the case of appellant is not necessarily to be based upon the theory of *prostitution* which will be defined as indiscriminate commerce for hire but rather that she enters for some *other immoral purpose,* such as the purpose here shown, that of *concubinage* or to maintain an irregular marriage relation, there being no possible pretense of marriage.

CONCLUSION

In conclusion we show that the deportation proceeding now under review is the ordinary case where the department fairly considered the case, accorded appellant all the rights to which she was entitled, allowed her to present any material evidence which she offered. She was represented by counsel and it conclusively appeared from her own statement that she had been previously married. She made no pretense that the previous marriage was dissolved by death or divorce; it was shown in fact that the first husband is still living and that she was not divorced, whence there arises the conclusive presumption that she entered the United States to assume an irregular relationship with one Shep, which would have constituted concubinage, and which thus would have been an immoral act, and she was properly deported.

The order of the District Court should be affirmed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney.

T. J. SHERIDAN,
Asst. United States Attorney.

Attorneys for Appellee.

No. 5136

United States

Circuit Court of Appeals

For the Ninth Circuit.

A. T. HAMMONS, Superintendent of Banks of the State of Arizona, and J. S. DODSON, Special Deputy Superintendent of Banks for the State of Arizona,

Appellants,

vs.

MARYLAND CASUALTY COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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Counsel for Appellants.

FRANCIS S. WILSON, Santa Fe, New Mexico, and FRANK E. CURLEY and SAMUEL PATTEE, Tucson, Arizona.

Counsel for Appellee.

United States Circuit Court of Appeals for the Ninth Judicial Circuit.

A. T. HAMMONS, Superintendent of Banks of the State of Arizona, and J. S. DODSON, Special Deputy Superintendent of Banks for the State of Arizona,

Appellants,

vs.

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Appellee.

TRANSCRIPT OF RECORD.

FIRST AMENDED BILL.

COMES NOW, MARYLAND CASUALTY COMPANY, a corporation organized and existing

under the laws of the State of Maryland, and having its principal place of business in Baltimore in that State, plaintiff in this suit, and complains of the defendants, A. T. Hammons, the duly appointed, qualified and acting Superintendent of Banks of the State of Arizona; J. S. Dodson, the duly appointed, qualified and acting Special Deputy Superintendent of Banks of the State of Arizona; George J. Schaefer, the duly elected, qualified and acting Treasurer and Ex-officio Tax Collector of Navajo County, State of Arizona, and Navajo County, a quasi public corporation organized and existing under and by virtue of the laws of Arizona, with power to sue and be sued and with its seat of government at the town of Holbrook, Arizona, each of whom is a citizen of the State of Arizona, residing within the boundaries of said State and an inhabitant of the District of Arizona aforesaid and says:

1. That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.

2. That on the 20th day of January, 1913, the plaintiff herein, being duly authorized to transact the business of suretyship in the State of Arizona, made, executed and delivered to defendant, Navajo County, a depository bond in the sum of five thousand dollars for the Bank of Winslow, of Winslow, Arizona, a banking corporation under the laws of the State of Arizona, as principal, to secure deposits of said County in the said Bank, said bond being in due form as required by law and at all times material hereto in full force and effect as

such depository, a copy of the said bond being attached hereto and made a part hereof as though written herein, and marked Exhibit "A"; that on the 10th day of August, 1916, the plaintiff herein, being duly authorized to transact the business of suretyship in the State of Arizona, made, executed and delivered to defendant, Navajo County, a depository bond in the sum of ten thousand dollars for the Bank of Winslow, Arizona, a banking corporation under the laws of the State of Arizona, as principal, to secure deposits of said County in the said Bank, said bond being in due form as required by law and at all times material hereto in full force and effect as such depository bond, a copy of the said bond being attached hereto and made a part hereof as though written herein and marked Exhibit "B"; that on the 6th day of January, 1920, the plaintiff herein being duly authorized to transact the business of suretyship in the State of Arizona, made, executed, and delivered to the County of Navajo, State of Arizona, a depository bond in the sum of ten thousand dollars for the Bank of Winslow, of Winslow, Arizona, a banking corporation under the laws of the State of Arizona as principal, to secure deposits of said County in the said Bank, said bond being in due form as required by law and at all times material hereto in full force and effect as such depository bond, a copy of the said bond being attached hereto and made a part hereof as though written herein, and marked Exhibit "C"; that on the 13th day of June, 1921, the plaintiff herein being duly authorized to transact the business of suretyship in the State of

Arizona, made, executed, and delivered to defendant, Navajo County, a depository bond in the sum of fifteen thousand dollars for the Bank of Winslow, of Winslow, Arizona, a banking corporation under the laws of the State of Arizona, as principal, to secure deposits of said County in the said Bank, said bond being in due form as required by law and at all times material hereto in full force and effect as such depository bond, a copy of the said bond being attached hereto and made a part hereof, as though written herein, and marked Exhibit "D."

3. That on the 4th day of October, 1924, the said Bank of Winslow, of Winslow, Arizona, closed its doors and suspended payments of deposits, and became, was and is now, insolvent, and pursuant to the laws of Arizona, the defendant, A. T. Hammons, Superintendent of Banks, took over said Bank and appointed the defendant, J. S. Dodson, Special Deputy Superintendent of Banks, as his agent, to take charge of the said Bank for purposes of liquidation, and the said defendant, J. S. Dodson, is now and ever since that date, has been, such agent in charge of the said Bank.

4. That on the date of the suspension of payments by the said Bank, as alleged in the preceding paragraph, there was on deposit funds of the defendant, Navajo County, in the said Bank in the aggregate sum of fifty-two thousand one hundred sixty-four and 20–100 ($52,164.20) dollars, which was covered by the four bonds of the plaintiff as above described, and by thirty-five town of Winslow Improvement Bonds and worth the sum of

twelve thousand five hundred nineteen and 61–100 ($12,519.61) dollars, and by Navajo County registered school warrants in the sum of one thousand nine hundred fifty-six 79–100 ($1,956.79) dollars, and by Navajo County registered County warrants in the sum of two thousand eight hundred thirty-nine and 24–100 ($2,839.24) dollars, as described and set forth in a receipt in possession of the defendant, Dodson, as the agent of the State Superintendent of Banks in charge of the said Bank aforesaid, and by additional Navajo County registered warrants in the sum of two thousand five hundred eighty-three and 37–100 ($2,583.37) dollars, as described and set forth in a letter signed by the County Treasurer in the form of a receipt dated October 18, 1923; that the said security aggregates the sum of fifty-nine thousand eight hundred ninety-nine and 01–100 ($59,899.01) dollars which represents the indemnity held by defendant, Navajo County, as against a loss occasioned or which might be occasioned by the failure or default of the Bank.

5. That it appears from the report of the defendant, Dodson, acting as the agent of the State Superintendent of Banks, filed by him in the Superior Court for Navajo County at the County Court House in the Town of Holbrook, Arizona, that at the date the said Bank of Winslow suspended payments, the Bank was the holder and owner for value of certain warrants of defendant, County of Navajo, as follows, to wit:

AT WINSLOW

School Warrants held as cash items .....$	594.15
County and School Warrants transmitted to the County Treasurer for collection after having been paid by the Bank, the following; but not paid at date of closing of Bank:	
August 22, 1924, County Treasurer.....	288.93
September 30, 1924, County Superintendent of Schools	212.65
October 1st, 1924, County Superintendent of Schools	10.72
October 2, 1924, County Treasurer	3,497.12

AT HOLBROOK BRANCH OF BANK OF WINSLOW

County Warrants held as cash items .....$	24.50
County and school District Warrants paid by the Warrants paid by the Bank and transmitted to the County Treasurer for collection but not paid at date of closing of Bank:	
October 31, 1923, County School Superintendent	7.56
July 23, 1924, County Treasurer	98.83
July 24, 1924, County Treasurer	4.00
September 23, 1924, County Treasurer	82.45
September 25, 1924, County Treasurer ...	14.00
September 30, 1924, County School Supt...	74.45
October 3, 1924, County Treasurer	103.50
	$5,012.86

That in addition to the foregoing, it appears from said report that the Bank of Winslow was the owner and holder and in possession of, on the date that it suspended payments, registered warrants issued by defendant, Navajo County, in the aggregate sum of twenty-three thousand six hundred ninety-one and 60–100 ($23,691.60) dollars, in the usual form as required by the laws of the State of Arizona, in payment of the Accounts of the said County for salaries, expenses and for the purchase of supplies and for other lawful County purposes, which had been purchased or paid by the Bank of Winslow prior to the date of its suspension of payments, and each of said warrants had been duly registered by the defendant, George J. Schaefer as County Treasurer and Ex-Officio Tax Collector of the County of Navajo, or his predecessor or predecessors in office, and bear interest from the date of registration at the rate of six per cent per annum as by the laws of Arizona provided; that the unregistered warrants set forth above and described as either in the possession of the Bank or in transit or in the hands of the defendant, Schaeffer, for collection, were not registered and do not bear interest; that all of the said warrants whether registered or unregistered, were in form demand notes of the defendant, Navajo County, and constituted promises to pay on presentation by the payee or on his order to the said defendant, George J. Schaefer, as such County Treasurer and Ex-Officio Collector of Navajo County, and as such were properly subjects of offset as against

the debt of the said Bank of Winslow to the County of Navajo, on account of said deposits of the said County in the said Bank.

6. That on or about the 20th day of November, 1924, the plaintiff made due demand upon the defendant, J. S. Dodson, as the agent of the State Superintendent of Banks, in charge of the Bank of Winslow, to allow and make the said offset, and tendered to defendant, Navajo County, and to defendant, George J. Schaefer, Treasurer and Ex-Officio Collector, the balance due after allowing all credits and offsets as in the following table set forth:

Total amount of County funds on deposit		$52,164.20
CREDITS AND OFFSETS:		
Improvement Bonds of Town of Winslow pledged to County	$12,519.21	
County Warrants pledged as security to County.....	7,379.40	
County Warrants unregistered owned and held by the Bank in manner above	5,012.86	
County Warrants registered, held and owned by Bank	16,312.20	41,223.67
Balance due from plaintiff.....		10,940.53
Total loss		$52,164.20

which said tender was refused, and ever since said date has been refused, and has been withdrawn for reasons hereinafter stated, and plaintiff now offers and hereby tenders to the County of Navajo whatever amount is justly due it, after the allowance of all credits and offsets herein prayed for.

7. That since the said Bank of Winslow closed its doors and the defendant Dodson took possession of its assets, as hereinbefore alleged, the said Dodson made demand upon the defendant Schaefer for the return of bonds of the Town of Winslow, approximately of the par value of seven thousand dollars ($7,000.00) held by said Schaefer as a part of the pledge to secure County deposits in said Bank, as alleged and set forth in paragraphs four and six herein, and the said Schaefer, without right or authority, and in violation of the rights of the plaintiff in said pledge, and especially in violation of its rights to have said bonds, or the proceeds thereof, applied in deduction of the debt to the County of Navajo represented by the County deposits in the Bank of Winslow, as hereinbefore alleged, before the plaintiff could be called upon to pay for any alleged default on the part of its principal, the said Bank of Winslow returned to the said Dodson, as Special Deputy Superintendent of Banks in charge of said insolvent Bank of Winslow, the bonds so demanded, and, as plaintiff is informed and believes, and therefore states the fact to be, that said Dodson is holding the same as assets of the trust estate, free from the pledge to the County of Navajo, and intends to convert the same

to the use and benefit of the creditors of said trust estate.

8. That said action on the part of said defendant Schaefer operated to release the plaintiff from any liability to the County of Navajo, to the extent of the value of said bonds, principal and interest, and to reduce the alleged indebtedness of plaintiff to the County of Navajo in that amount, and that in all equity and justice, the defendants Hammons and Dodson should be required and ordered to return said bonds to the defendant Schaefer, to be by him reduced to money and applied in an orderly manner, to the reduction of the debt of defendant Hammons, as Superintendent of Banks, and defendant Dodson, as Special Deputy Superintendent in charge of said Bank of Winslow, to the County of Navajo.

9. That since the filing of the Bill in this case, and after the transaction described in the two preceding paragraphs, the defendant Schaefer, acting as County Treasurer of Navajo County, and upon the instructions of the Board of Supervisors of Said County, and in accordance with the laws of the State of Arizona, in such cases made and provided, has sold the remaining improvements bonds of the Town of Winslow, and turned them into money, and applied the proceeds to the reduction of the debt due to the County of Navajo by the defendant Hammons as Superintendent of Banks, and the defendant Dodson as Special Deputy Superintendent of Banks in charge of said Bank of Winslow, and as offset against the said debt the

County Warrants listed in paragraph six hereinbefore set forth as "County Warrants pledged as security to County" in the sum of $7,379.40, with interest amounting to $577.19, a total credit from both sources of $13,531.76, thereby reducing said debt to $37,752.44; that due to the action of the said County Treasurer, the defendant Schaefer, as in the two preceding paragraphs alleged, the plaintiff has been released from any liability for the default of its principal, to the extent of the bonds, principal and interest, returned to the defendant Dodson, said principal and interest amounting as plaintiff is informed and believes, to a sum in excess of $7,800.00; that as a result of said transaction, the total demand upon plaintiff is not in excess of $30,000.00.

10. That of the registered warrants described in paragraph five herein, it now appears that the officers of the Bank of Winslow pledged to the Treasurer of the County of Apache, State of Arizona, to secure deposits of that County in said Bank of Winslow, on or about the 28th day of September, 1924, Navajo County registered warrants in the total amount of $8,110.38, as described and set forth in the list attached hereto and made a part hereof, as though written herein, and marked "Exhibit E"; that said pledge was without authority of law, and in violation of plaintiff's rights to claim an offset in that amount, and void because it destroys the right of the County of Navajo to claim an offset in that amount against the indebtedness of the Bank of Winslow to it, on account of said deposit,

as the officers of that County are required to do under paragraph 2436 of the Revised Statutes of the State of Arizona, 1913, Civil Code; that the title to said warrants, free from any pledge to the Treasurer of said County of Apache, is in the defendant Hammons, as Superintendent of Banks, acting by and through the defendant Dodson, as Special Deputy Superintendent of Banks, in charge of the Bank of Winslow, and should be returned to defendant Dodson by the Treasurer of Apache County, to be dealt with in this case as the Court may determine.

11. That upon the answer of the defendant Dodson on file herein, it appears that on or about the first day of February, 1925, he had in his official possession registered warrants of the County of Navajo in the aggregate sum of $10,922.44, upon which there was due and payable, interest in the sum of $291.00, an aggregate amount of $11,213.44, and the total offsets which should be claimed by the said County of Navajo against the debt due it by virtue of Navajo County Warrants in the possession of said defendant Dodson, as such Special Deputy Superintendent of Banks, in charge of the Bank of Winslow, or the defendant Hammons, as Superintendent of Banks, or which should be in the possession of them, or one of them, are as follows:

In possession of Special Deputy Superintendent of Banks	$11,213.44
In possession of Treasurer of Apache County (without computation of interest)	8,110.38
In transit as per paragraph 5 hereof (without interest)	5,012.86
Total	$24,336.68

and as the net claim, with all credits and offsets which have been, or should have been realized upon is now reduced to approximately $30,000.00, the foregoing offsets, with interest in addition, would reduce the amount to not in excess of $5,000.00 as the sum due the County of Navajo from the plaintiff, as a result of the default of its principal, the Bank of Winslow.

12. That notwithstanding the demand of the plaintiff, as in the preceding paragraph recited, and notwithstanding that the defendant, George J. Schaefer, Treasurer and Ex-Officio Tax Collector of the County of Navajo is, as plaintiff is informed and believes, and therefore states the fact to be, ready and willing that the said credits and offsets should be allowed substantially as hereinbefore claimed by the plaintiff, the defendant, J. S. Dodson, Special Deputy Superintendent of Banks, and in charge of the liquidation of the said Bank of Winslow as aforesaid, acting as agent of the defendant, A. T. Hammons, Superintendent of Banks, as aforesaid, and pursuant to his instructions, has failed and refused, and does now fail and refuse

to make the said offset and to allow the same to defendant, Navajo County, and to permit the plaintiff herein to pay the loss after the said credits and offsets have been allowed in the sum set forth in the preceding paragraph, whereby the balance of five thousand dollars ($5,000.00) representing the loss of the plaintiff herein, could be paid and plaintiff discharged from its charges and obligations thereunder, and the defendant, A. T. Hammons, Superintendent of Banks of the State of Arizona, by virtue of said refusal threatens to prevent the plaintiff herein from obtaining the benefit and advantage of the said offsets and just credits and to destroy same, to the irreparable damage of plaintiff herein.

13. That the defendant, J. S. Dodson, Special Deputy Superintendent of Banks threatens to sell, assign and transfer the said registered and unregistered warrants of Navajo County to third persons who would thereby become owners and holders of the said registered and unregistered warrants for value without notice of the claim of the plaintiff for the offsets and credits herein set forth and the plaintiff would thereby be deprived of any remedy at law and would suffer irreparable loss.

14. That the defendant, the said J. S. Dodson, as such Special Deputy Superintendent of Banks, threatens to demand payment of defendant, Navajo County, and of the defendant, George J. Schaefer as County Treasurer and Ex-Officio Tax Collector of the County of Navajo, of all said registered and

unregistered warrants or a material part thereof, and the defendant, George J. Schaefer, as such County Treasurer and Ex-Officio Tax Collector would be required to pay from the funds of said County available for that purpose, the said registered and unregistered warrants whereby the plaintiff herein would be deprived of any remedy at law in the event of a suit at law brought by the said George J. Schaefer as said County Treasurer and Ex-Officio Tax Collector of Navajo County or by the defendant Navajo County to recover upon the said bonds of the plaintiff as hereinbefore described and set forth, and the plaintiff thereby suffer irreparable loss.

15. That by the refusal of the said J. S. Dodson, Special Deputy Superintendent of Banks, and the defendant A. T. Hammons, Superintendent of Banks of the State of Arizona, to allow the said offsets, and because of the insolvency of the principal, the said Bank of Winslow, plaintiff herein has no adequate remedy at law and would be remediless unless in a court of equity where matters of this kind are properly recognizable and relievable; and plaintiff charges that the said A. T. Hammons, the Superintendent of Banks of the State of Arizona, and the said J. S. Dodson, Special Deputy Superintendent of Banks, ought, therefore, to be restrained by the order and injunction of this Honorable Court from selling, assigning or otherwise disposing of the said registered and unregistered warrants or presenting them to the County of Navajo or to the defendant George J. Schaefer,

County Treasurer and Ex-Officio Tax Collector of the said County for payment, or from in any manner disturbing or altering the *status quo* of the condition of the said warrants, both registered and unregistered, or the improvement bonds of the Town of Winslow, until the further order of this Court, or pending the determination of the issues herein presented, and that the said defendant, George J. Schaefer, as such Treasurer and Ex-Officio Tax Collector of Navajo County ought to be restrained by the order and injunction of this Honorable Court from paying the said registered or unregistered warrants pending the determination of the issues herein presented.

WHEREFORE, plaintiff prays that the defendants may answer the premises, and

1. That the defendant A. T. Hammons, Superintendent of Banks of the State of Arizona, and the defendant J. S. Dodson, Special Deputy Superintendent of Banks, and the defendant George J. Schaefer, County Treasurer and Ex-Officio Tax Collector of the County of Navajo, and Navajo County shall *immediate* list the credits and offsets as they existed on the 4th day of October, 1924, between the said County and the said Bank of Winslow.

2. That the amount of County Funds on deposit set out, to-wit: $52,164.20, may be satisfied and discharged to the extent of the aggregate sum represented by Navajo warrants, both registered and unregistered, owned on said date by the Bank of Winslow, and the value of the Improvement Bonds of

the Town of Winslow, to-wit: $12,519.21, and that the plaintiff herein be decreed to owe and be directed to pay the balance due the defendant Navajo County, and that plaintiff be thereby wholly relieved of all its liability under and by virtue of its Depository Bond as in this Bill set forth plaintiff being ready and willing, and hereby offering to pay to the said County the said amount.

3. That an order to show cause do issue herein, directed to the Treasurer of Apache County, State of Arizona, directing him at a time and place to be fixed by this Honorable Court, or the Judge thereof, to appear before this Court and show cause why he should not forthwith return the warrants listed herein in the list marked "Exhibit E" to the defendant Hammons, Superintendent of Banks, and the defendant Dodson, as Special Deputy Superintendent of Banks, to be disposed of as may be ordered or directed by the Court.

4. That the injunction heretofore entered herein against the defendants, and each of them, be continued until the entry of the final decree herein, and for such other and further relief in the premises as to the Court may seem just and equitable, and for its costs in this behalf expended.

Answer under oath is hereby waived.

(Signed) FRANK E. CURLEY,
(Signed) SAMUEL L. PATTEE,
Solicitors for Plaintiff,
Tucson, Arizona.

(Signed) FRANCIS C. WILSON,
Of Counsel for Plaintiff,
Santa Fe, New Mexico.

United States of America,
District of Arizona,—ss.

Samuel L. Pattee, being first duly sworn, deposes and says that he is one of the solicitors for the plaintiff herein; that the plaintiff is a foreign corporation and has no officers within the State of Arizona authorized to make this verification for it; wherefore he makes this verification for and on behalf of the said plaintiff and as his solicitor; that he has read the foregoing amended Bill in Equity, and knows the contents thereof, and that the matters and things therein stated are true, to the best of his knowledge and belief.

(Signed) SAMUEL L. PATTEE.

Subscribed and sworn to before me this 13th day of June, 1925.

(Seal) (Signed) MAUDE I. BOWEN,
Notary Public, Pima County, Arizona.

My commission will expire June 1st, 1929.

PLAINTIFF'S EXHIBIT "A."

MARYLAND CASUALTY COMPANY.

BALTIMORE.

BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, THE BANK OF WINSLOW, of Winslow, Arizona, as principal, and the MARYLAND CASUALTY COMPANY, of Baltimore, a corporation organized under the laws of the State of Maryland, with its principal place of business at

Baltimore, Maryland, duly qualified to become surety upon bonds in the State of Arizona, as surety, are held and firmly bound unto the County of Navajo, in the penal sum of Five Thousand ($5,000.00) Dollars, lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our successors, and assigns, jointly and severally, firmly by these presents.

Dated this twentieth day of January, A. D., 1923.

THE CONDITION of this obligation is such, that whereas the above named principal, THE BANK OF WINSLOW, of Winslow, Arizona, was, on the twentieth day of January, A. D. 1913, appointed and designated by the County Treasurer of the County of Navajo, State of Arizona, with the consent of the Board of Supervisors of Navajo County, Arizona, to be a depository of public moneys for the said County of Navajo, pursuant to the conditions of Chapter Fifty-six (56) of the laws of Arizona for 1905, and amendments thereto.

NOW, THEREFORE, if the said THE BANK OF WINSLOW, of Winslow, Arizona, shall well, truly and faithfully perform and discharge all duties and responsibilities now required or that may hereafter be required of it under any law of the State of Arizona and will promptly pay out to the parties entitled thereto all public moneys of the County of Navajo in its hands or that may come into its hands, upon lawful demand therefor, and will whenever required thereto by law or lawful demand, pay over to the County Treasurer of the

County of Navajo public moneys with interest thereon at the rate of two per cent (2%) per annum, computed on daily balances, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.

THE BANK OF WINSLOW,
By WM. H. BAGG, Vice-President.
MARYLAND CASUALTY COMPANY,
By C. A. HANDS, Agent.

(Corporate Seal)

Attest: GEO. H. KEYES, Jr.,
Cashier.

(Corporate Seal)

Attest: H. B. WILKINSON,
Attorney-in-fact.

Approved: August 7, 1923.

C. E. OWENS,
Chairman Board of Supervisors.
JOSEPH PETERSON,
Member of Board.
W. J. CROZER,
Member of Board of Sup.

PLAINTIFF'S EXHIBIT "B."

MARYLAND CASUALTY COMPANY.

BALTIMORE.

KNOW ALL MEN BY THESE PRESENTS: That we, THE BANK OF WINSLOW, of Winslow, Arizona, as Principal, and the MARYLAND CASUALTY COMPANY, of Baltimore, a corporation organized under the laws of the State of

Maryland, with its principal place of business at Baltimore, Maryland, and duly qualified to become surety upon bonds in the State of Arizona, as surety, are held and firmly bound unto the County of Navajo, in the penal sum of Ten Thousand Dollars ($10,000.00) lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Dated this tenth day of August, A. D. 1926.

THE CONDITION of this obligation is such, that whereas the above named principal, THE BANK OF WINSLOW, of Winslow, Arizona, was on the tenth day of August, A. D. 1916, appointed and designated by the County Treasurer of the County of Navajo, State of Arizona, to be a depository of public money for the said County of Navajo, pursuant to the provisions of the laws of the State of Arizona in such cases made and provided:

NOW THEREFORE, if the said THE BANK OF WINSLOW, of Winslow, Arizona, shall well, truly and faithfully perform and discharge all duties and responsibilities now required or that may hereafter be required of it under any law of the State of Arizona and will promptly pay out to the parties entitled thereto all public moneys of the County of Navajo in its hands or that may come into its hands, upon lawful demand therefor, and will, whenever required thereto by law or lawful demand, pay over to the County Treasurer of the

County of Navajo public moneys with interest thereon at the rate of two per cent (2%) per annum, computed on daily balances, then this obligation shall be void, and of no effect, otherwise to be and remain in full force and virtue.

THE BANK OF WINSLOW,
By WM. H. BAGG, Vice-President.
MARYLAND CASUALTY COMPANY,
By L. E. WHITE, Attorney-in-fact.
Attest: GEO. H. KEYES, Jr.,
Secretary.

Countersigned:
(Corporate Seal) JOHN M. LONGAN,
Attorney-in-fact.

Approved:

C. E. OWENS,
Chairman Board of Supervisors,
Navajo County, Arizona.
JOSEPH PETERSON,
Member of Board.
W. J. CROZIER,
Member of Board of Sup.

PLAINTIFF'S EXHIBIT "C."

MARYLAND CASUALTY COMPANY.

BALTIMORE.

BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, THE BANK OF WINSLOW, of Winslow, Arizona, as principal, and the MARYLAND CASUALTY COMPANY, of Baltimore, a cor-

poration organized under the laws of the State of Maryland, with its principal place of business at Baltimore, Maryland, and duly qualified to become surety upon bonds in the State of Arizona, as surety, are held and firmly bound unto the County of Navajo, State of Arizona, in the penal sum of Ten Thousand Dollars, ($10,000.00) lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Dated this eighth day of January, A. D. 1920.

THE CONDITION of this obligation is such, that whereas the above named principal, THE BANK OF WINSLOW, of Winslow, Arizona, was on the eighth day of January, 1920, appointed and designated by the County Treasurer of the County of Navajo, State of Arizona, with the consent of the Board of Supervisors of Navajo County, Arizona, to be a depository of public money for the said County of Navajo, Arizona, pursuant to the provisions of the laws of the State of Arizona in such cases made and provided:

NOW, THEREFORE, if the said THE BANK OF WINSLOW, of Winslow, Arizona, shall well, truly and faithfully perform and discharge all duties and responsibilities now required, or that may hereafter be required of it under any law of the State of Arizona, and will promptly pay out to the parties entitled thereto, all public moneys of the County of Navajo in its hands or that may come into its hands, upon lawful demand thereafter, and

will, whenever required thereto by law or lawful demand, pay over to the County Treasurer of the County of Navajo, public moneys with interest thereon at the rate of two per cent (2%) per annum, computed on daily balances, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.

THE BANK OF WINSLOW,
By WM. H. BAGG, President.
MARYLAND CASUALTY COMPANY,
By M. H. FOSTER,
Attorney-in-fact.
Attest: GEO. H. KEYES, Jr.,
Secretary.

Countersigned:
(Corporate Seal) By JOHN M. LONGAN,
Attorney-in-fact.

Approved: August 7, 1923.
C. E. OWENS,
Chairman Board of Supervisors,
Navajo County, Arizona.
JOSEPH PETERSON,
Member of Board.
W. J. CROZIER,
Member of Board of Sup.

PLAINTIFF'S EXHIBIT "D."

MARYLAND CASUALTY COMPANY.

BALTIMORE.

BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, THE BANK OF WINSLOW, of Winslow, Arizona, as principal, and the MARYLAND CASUALTY COMPANY, of Baltimore, a corporation organized under the laws of the State of Maryland, with its principal place of business at Baltimore, Maryland, and duly qualified to become surety upon bonds in the State of Arizona, as surety, are held and firmly bound unto the County of Navajo, State of Arizona, in the penal sum of Fifteen Thousand Dollars ($15,000.00) lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Dated this thirteenth day of June, A. D. 1921.

THE CONDITION of this obligation is such, that whereas the above named principal, THE BANK OF WINSLOW, of Winslow, Arizona, was on the sixth day of June, 1921, appointed and designated by the County Treasurer of the County of Navajo, State of Arizona, with the consent of the Board of Supervisors, of Navajo County, Arizona, to be a depository of public money for the said County of Navajo, Arizona, pursuant to the provision of the laws of the State of Arizona in such cases made and provided:

NOW, THEREFORE, if the said THE BANK OF WINSLOW, of Winslow, Arizona, shall well, truly and faithfully perform and discharge all duties and responsibilities now required, or that may hereafter be required of it under any law of the State of Arizona, and will promptly pay out to the parties entitled thereto, all public moneys of the County of Navajo in its hands or that may come into its hands, upon lawful demand therefor, and will, whenever required thereto by law or lawful demand, pay over to the County Treasurer of the County of Navajo, public moneys with interest thereon at the rate of two per cent (2%) per annum, computed on daily balances, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.

THE BANK OF WINSLOW,
By WM. H. BAGG,
President.

MARYLAND CASUALTY COMPANY,
By CHARLES MACBETH,
Attorney-in-fact.

Countersigned by:
(Corporate Seal) JOHN M. LONGAN,
Attorney-in-fact.

Approved: August 7, 1923,
C. E. OWENS,
Chairman Board of Supervisors,
Navajo County, Arizona.
JOSEPH PETERSON,
Member of Board.
W. J. CROZER,

Member of Board of Sup.

Approved: July 6, 1921.

C. E. OWENS,
Chairman Board of Supervisors.
Navajo County, Arizona.

Filed June 20, 1921. M. R. Tanner, Clerk Board of Supervisors, Navajo County, Arizona.

PLAINTIFF'S EXHIBIT "E."

No.	Amount	Fund	Date	Date Registered	No.
31	$150.00	General	Aug. 6, 1924	Aug. 8, 1924	146
0313	8.00	Poor	Aug. 6, 1924	Aug. 9, 1924	55
0308	8.00	Poor	Aug. 6, 1924	Aug. 9, 1924	54
2493	41.67	Salary	July 31, 1924	Aug. 12, 1924	147
1379	70.40	Road	Aug. 4, 1924	Aug. 8, 1924	226
1386	63.00	Road	Aug. 4, 1924	Aug. 8, 1924	227
1197	15.85	Expense	Aug. 4, 1924	Aug. 9, 1924	276
1178	12.50	Expense	Aug. 4, 1924	Aug. 9, 1924	277
1211	1.53	Expense	Aug. 4, 1924	Aug. 8, 1924	278
1191	101.70	Expense	Aug. 4, 1924	Aug. 8, 1924	279
1192	4.00	Expense	Aug. 4, 1924	Aug. 8, 1924	280
1189	5.00	Expense	Aug. 4, 1924	Aug. 8, 1924	281
1195	2.00	Expense	Aug. 4, 1924	Aug. 8, 1924	282
1196	3.07	Expense	Aug. 4, 1924	Aug. 8, 1924	283
1180	16.00	Expense	Aug. 4, 1924	Aug. 8, 1924	284

No.	Amount	Fund	Date	Date Registered	No.
0296	8.00	Poor	July 2, 1924	Aug. 8, 1924	
2476	75.00	Salary	July 31, 1924	Aug. 2, 1924	126
2480	41.67	Salary	July 31, 1924	Aug. 1, 1924	116
2485	100.00	Salary	July 31, 1924	Aug. 1, 1924	117
24.50	41.66+1c	Salary	July 15, 1924	July 22, 1924	109
2467	4.00	Salary	July 15, 1924	July 26, 1924	113
12	179.25	General	July 22, 1924	July 25, 1924	137
20	142.36	General	July 22, 1924	July 25, 1924	138
206	75.00	General		July 25, 1924	139
2446	41.67	Salary	July 15, 1924	July 17, 1924	96
2442	75.00	Salary	July 15, 1924	July 19, 1924	97
2451	100.00	Salary	July 15, 1924	July 18, 1924	101
10	50.00+16c	General	July 15, 1924	July 17, 1924	133
201	4.75	General	July 14, 1924	July 18, 1924	136
1131	37.50	Expense	July 7, 1924	July 12, 1924	242
1138	22.25	Expense	July 7, 1924	July 12, 1924	243

No.	Amount	Fund	Date	Date Registered	No.
625	30.05	Expense	Oct. 16, 1923	Oct. 21, 1923	136
611	30.00	Expense	Oct. 16, 1923	Oct. 20, 1923	146
606	1.35	Expense	Oct. 16, 1923	Oct. 21, 1923	134
603	23.65	Expense	Oct. 16, 1923	Oct. 21, 1923	135
826	46.10	Road	Oct. 16, 1923	Oct. 19, 1923	128
0163	10.00	Poor	Oct. 11, 1923	Oct. 21, 1923	46
627	14.55	Expense	Oct. 16, 1923	Oct. 21, 1923	137
872	12.50	Expense	Mar. 3, 1924	Mar. 9, 1924	76
879	6.50	Expense	Mar. 3, 1924	Mar. 8, 1924	181
943	32.45	Expense	Apr. 8, 1924	Apr. 13, 1924	225
946	35.33	Expense	Apr. 8, 1924	Apr. 13, 1924	226
915	23.40	Expense	Apr. 8, 1924	Apr. 13, 1924	227
950	10.00	Expense	Apr. 8, 1924	Apr. 13, 1924	228
972	35.75	Expense	Apr. 8, 1924	Apr. 16, 1924	233
2531	25.00	Salary	Aug. 15, 1924	Aug. 19, 1924	161
2511	75.00	Salary	Aug. 15, 1924	Aug. 16, 1924	162

No.	Amount	Fund	Date	Date Registered	No.
2520	100.00	Salary	Aug. 15, 1924	Aug. 16, 1924	163
2515	41.67	Salary	Aug. 15, 1924	Aug. 16, 1924	164
1203	53.20	Expense	Aug. 4, 1924	Aug. 15, 1924	304
1162	29.00	Road	Mar. 13, 1924	Mar. 18, 1924	183
1131	300.00	General	Apr. 12, 1924	Apr. 15, 1924	129
1203	36.00	Road	Apr. 12, 1924	Apr. 15, 1924	196
1130	801.47	General	Apr. 12, 1924	Apr. 15, 1924	130
944	230.98	Expense	Apr. 8, 1924	Apr. 11, 1924	221
912	92.85	Expense	Apr. 8, 1924	Apr. 11, 1924	222
922	33.86	Expense	Apr. 8, 1924	Apr. 11, 1924	223
0314	10.00	Poor	Aug. 6, 1924	Aug. 8, 1924	
5	25.00	General	July 14, 1924	July 16, 1924	132
30	27.00	General	Aug. 6, 1924	Aug. 8, 1924	
203	17.30	General	July 14, 1924	July 17, 1924	134
202	.60	General	July 14, 1924	July 17, 1924	135
207	75.00	General	Aug. 1, 1924	Aug. 3, 1924	145

No.	Amount	Fund	Date	Date Registered	No.
1329	28.00	Road	June 30, 1924	July 17, 1924	208
1370	75.00	Road	July 15, 1924	July 17, 1924	209
1340	42.00	Road	June 30, 1924	July 12, 1924	210
1361	24.00	Road	June 30, 1924	July 12, 1924	211
1357	77.00	Road	June 30, 1924	July 10, 1924	212
1339	13.50	Road	June 30, 1924	July 10, 1924	213
1338	4.00	Road	June 30, 1924	July 10, 1924	214
1328	18.38	Road	June 30, 1924	July 10, 1924	215
1344	76.95	Road	June 30, 1924	July 18, 1924	216
1367	41.20	Road	July 7, 1924	July 13, 1924	217
1366	9.00	Road	July 7, 1924	July 20, 1924	218
1318	24.00	Road	June 30, 1924	July 20, 1924	219
1376	16.00	Road	Aug. 4, 1924	Aug. 7, 1924	220
1375	75.00	Road	Aug. 4, 1924	Aug. 6, 1924	223
1374	98.00	Road	Aug. 4, 1924	Aug. 6, 1924	222
1390	251.80	Road	Aug. 4, 1924	Aug. 12, 1924	230

No.	Amount	Fund	Date	Date Registered	No.
1387	20.00	Road	Aug.. 4, 1924	Aug. 9, 1924	231
1389	11.32	Road	Aug. 4, 1924	Aug. 9, 1924	232
1378	3.76	Road	Aug. 4, 1924	Aug. 8. 1924	
1285	12.00	Road	June 3, 1924	July 23, 1924	257
1324	3.50	Road	June 30, 1924	Aug. 1, 1924	268
1115	1.25	Expense	June 30, 1924	July 16, 1924	244
1163	24.96	Expense	July 15, 1924	July 16, 1924	245
1154	20.00	Expense	July 7, 1924	July 17, 1924	246
1133	38.69	Expense	July 7, 1924	July 12, 1924	247
1156	87.78	Expense	July 7, 1924	July 12, 1924	248
1130	5.00	Expense	July 7, 1924	July 18, 1924	249
1144	25.80	Expense	July 7, 1924	July 15, 1924	250
1146	12.80	Expense	July 7, 1924	July 13, 1924	251
1145	9.40	Expense	July 7, 1924	July 13, 1924	252
1142	6.20	Expense	July 7, 1924	July 13, 1924	253
1157	26.00	Expense	July 7, 1924	July 13, 1924	254

No.	Amount	Fund	Date	Date Registered	No.
1155	207.60	Expense	July 7, 1924	July 13, 1924	255
1137	8.30	Expense	July 7, 1924	July 13, 1924	256
1184	46.54	Expense	Aug. 4, 1924	Aug. 8, 1924	
1210	51.80	Expense	Aug. 4, 1924	Aug. 7, 1924	271
1175	78.55	Expense	Aug. 4, 1924	Aug. 4, 1924	
1167	500.00	Expense	Aug. 4, 1924	Aug. 6, 1924	275
1206	2.00	Expense	Aug. 4, 1924	Aug. 10, 1924	290
1204	105.60	Expense	Aug. 4, 1924	Aug. 12, 1924	292
1177	8.95	Expense	Aug. 4, 1924	Aug. 12, 1924	293
1170	10.00	Expense	Aug. 4, 1924	Aug. 12, 1924	291
1199	16.20	Expense	Aug. 4, 1924	Aug. 12, 1924	295
1209	177.08	Expense	Aug. 4, 1924	Aug. 9, 1924	296
2458	125.00	Salary	July 15, 1924	July 15, 1924	93
2449	75.00	Salary	July 15, 1924	July 16, 1924	94
2457	30.00	Salary	July 15, 1924	July 16, 1924	95
2453	83.34	Salary	July 15, 1924	July 17, 1924	98

No.	Amount	Fund	Date	Date Registered	No.
2461	23.33	Salary	July 15, 1924	July 17, 1924	99
2448	125.00	Salary	July 15, 1924	July 17, 1924	100
2431	5.00	Salary	June 30, 1924	July 12, 1924	102
2436	3.50	Salary	June 30, 1924	July 10, 1924	103
2440	62.50	Salary	July 15, 1924	July 18, 1924	104
2444	50.00	Salary	July 15, 1924	July 20, 1924	105
2473	1.25	Salary	July 15, 1924	July 22, 1924	107
2450	37.50	Salary	July 15, 1924	July 22, 1924	108
2470	3.50	Salary	July 15, 1924	July 23, 1924	110
2466	5.00	Salary	July 15, 1924	July 23, 1924	111
2463	71.50	Salary	July 15, 1924	July 23, 1924	112
2495	32.50	Salary	July 31, 1924	July 31, 1924	115
2460	41.67	Salary	July 15, 1924	Aug. 1, 1924	121
2494	41.67	Salary	July 31, 1924	Aug. 1, 1924	122
274	62.50	Salary	July 31, 1924	Aug. 1, 1924	123
2501	4.00	Salary	July 31, 1924	Aug. 2, 1924	127

No.	Amount	Fund	Date	Date Registered	No.
2483	75.00	Salary	July 31, 1924	Aug. 2, 1924	128
2492	125.00	Salary	July 31, 1924	Aug. 7, 1924	132
2497	7.50	Salary	July 31, 1924	Aug. 7, 1924	133
2499	5.00	Salary	July 31, 1924	Aug. 7, 1924	134
2491	30.00	Salary	July 31, 1924	Aug. 7, 1924	135
2487	83.00	Salary	July 31, 1924	Aug. 7, 1924 8	136
2500	5.00	Salary	July 31, 1924	Aug. 7, 1924 5	137
0316	10.00	Salary	Aug. 6, 1924	Aug. 14, 1924	56
0309	25.00	Salary	Aug. 6, 1924	Aug. 13, 1924	57
2526	30.00	Salary	Aug. 15, 1924	Aug. 19, 1924	151
2522	83.34	Salary	Aug. 15, 1924	Aug. 17, 1924	152
2518	75.00	Salary	Aug. 15, 1924	Aug. 17, 1924	153
2530	32.50	Salary	Aug. 15, 1924	Aug. 17, 1924	154
2506	2.00	Salary	July 31, 1924	Aug. 14, 1924	156
2508	1.25	Salary	July 31, 1924	Aug. 14, 1924	157
2503	4.00	Salary	July 31, 1924	Aug. 15, 1924	158

No.	Amount	Fund	Date	Date Registered	No.
2468	4.00	Salary	July 15, 1924	Aug. 15, 1924	159
2434	4.00	Salary	June 30, 1924	Aug. 15, 1924	160
1383	35.05	Road	Aug. 4, 1924	Aug. 13, 1924	298
1187	13.20	Expense	Aug. 4, 1924	Aug. 17, 1924	361
1188	24.80	Expense	Aug. 4, 1924	Aug. 15, 1924	202
2509	62.50	Salary	Aug. 15, 1924	Aug. 12, 1924	2510
41	6.87	General	Aug. 13, 1924	Aug. 16, 1924	148
42	225.00	General	Aug. 13, 1924	Aug. 16, 1924	149
0317	10.00	Poor	Aug. 6, 1924	Aug. 16, 1924	58
1392	75.00	Road	Aug. 15, 1924	Aug. 16, 1924	299
1391	22.50	Road	Aug. 4, 1924	Aug. 16, 1924	300
1212	17.50	Expense	Aug. 4, 1924	Aug. 16, 1924	303
1185	11.30	Expense	Aug. 4, 1924	Aug. 8, 1924	
2505	3.50	Salary	July 31, 1924	Aug. 10, 1924	149

This is a copy of the Navajo County registered warrants held by Apache County as security for deposits with the St. John's branch of the Bank of Winslow.

GEORGE JARVIS,
County Treasurer.

O. K.—E. M. W.

(Title of Court and Cause.)

MOTION TO DISMISS FIRST AMENDED BILL OF COMPLAINT.

Come now the defendants, A. T. Hammons, Superintendent of Banks of the State of Arizona, J. S. Dodson, Special Deputy Superintendent of Banks of the State of Arizona, and move this Court that this action be dismissed for want of equity herein and particularly upon the following grounds to-wit:

1. That the bill filed herein by the plaintiff does not state any facts sufficient to constitute a cause of action against the said defendants or for the relief demanded therein.

2. That this Court has no jurisdiction of the matters set out in the said bill in that all of the said matters are involved in a proceeding entitled "In the Matter of the Liquidation of the Bank of Winslow, Winslow, Arizona, having branch offices at Holbrook, Arizona, and St. Johns, Arizona, File No. 1865 in the Superior Court of the State

of Arizona, in and for the County of Navajo, the said Superior Court of the State of Arizona, in and for the County of Navajo being a Court of competent jurisdiction over the said defendant as *Ex-Officio* receiver of the Bank of Winslow and insolvent banking corporation pursuant to the laws of the State of Arizona and that said defendants are acting under the orders of said Superior Court of Navajo County, Arizona, and the property and matters referred to in said Amended Bill of Complaint are a part of the *corpus* of the Estate of The Bank of Winslow, under supervision of last-named Court.

WHEREFORE, the said defendants will ever pray.

SAPP and
McLAUGHLIN,

Solicitors for the Defendants A. T. Hammons, Superintendent of Banks of the State of Arizona and J. S. Dodson, Special Deputy Superintendent of Banks of the State of Arizona.

O. K.—E. M. W.

(Title of Court and Cause.)

ANSWER TO FIRST AMENDED BILL OF COMPLAINT.

Come now A. T. Hammons, Superintendent of Banks of the State of Arizona, and J. S. Dodson, Special Deputy Superintendent of Banks of Ari-

zona, two of the above-named defendants and for answer herein allege and show to the Court without waiving the Motion to Dismiss filed herein:

I.

That the said answering defendants expressly now and at all times hereinafter save and reserve unto themselves any and all manner of profits and advantages of exception which may have been had or taken or which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the Plaintiff's First Amended Bill of Complaint filed herein and particularly reserve all manner of benefits and advantages of exception as to this Court, not having jurisdiction of subject manner of this action and of these defendants in the capacity in which sued.

II.

These answering defendants expressly allege herein that this Court has no jurisdiction of the matters set out in the said bill in that all of the matters therein set out and alleged are involved in a certain proceeding entitled "IN THE MATTER OF THE LIQUIDATION OF THE BANK OF WINSLOW, Winslow, Arizona, having branch offices at Holbrook, Arizona and St. Johns, Arizona." File No. 1865 in the Superior Court of the State of Arizona in and for the County of Navajo, said court being a court of competent jurisdiction and the defendant A. T. Hammons, Superintendent of Banks of the State of Arizona, herein having by operation of law, and proper proceedings in said

court pursuant to statute, been appointed as receiver of the Bank of Winslow, an insolvent banking corporation of the State of Arizona, and being thereby the Receiver of said Bank of Winslow, under and pursuant to the laws of the State of Arizona, and under the jurisdiction and control of the said Superior Court of Navajo County, Arizona, as a receiver of the said Bank and that the property and things referred to in this action are a part of the *corpus* of the estate of said Bank of Winslow aforesaid and as such are now in *custodia legis* in the said receivership proceedings.

III.

That the answering defendants admit the allegations of Paragraph No. I of the First Amended Bill of Complaint filed herein by the plaintiff and also admit the allegations of Paragraph No. II of the said First Amended Bill of Complaint filed herein by the Plaintiff, and also admit the allegations in Paragraph No. III of the said first amended bill of complaint filed herein by the plaintiff.

IV.

That the answering defendants admit the allegations of Paragraph No. IV, of the First Amended Bill of Complaint filed herein by the plaintiff in so far as the same sets out that there was on deposit in the Bank of Winslow funds of the County of Navajo County in the sum of Fifty-two Thousand One Hundred Sixty-four and 21–100 ($52,-164.21) Dollars but the defendants on information and belief deny all other allegations of the said Paragraph No. IV.

V.

The answering defendants deny the allegations of the Paragraph No. V of the said First Amended Bill of Complaint filed herein by the plaintiff and expressly allege that the only registered warrants and only warrants of Navajo County held by the Bank of Winslow on October 4th, 1924, are as set out in the defendants' Exhibit "A" hereto annexed and forming a part of this answer excepting such warrants as are set out in said First Amended Bill of Complaint as having been pledged with the County Treasurer of Apache County, Arizona, and the answering defendants further and expressly deny that the said warrants were in form demand notes of the defendant Navajo County and that they constituted promises to pay on presentation by the payee or on his order to the said defendant Geo. J. Schaefer and expressly deny that they were proper subject of offset as against the debt of Bank of Winslow to the County of Navajo on account of said deposits of said County in the said Bank and the answering defendants further expressly allege that the said warrants were each of them expressly drawn against the particular funds of Navajo County which are designated on Exhibit and which were generally known as follows: SALARY FUND, GENERAL FUND, ROAD FUND, EXPENSE FUND, INDIGENT FUND, SCHOOL GENERAL FUND AND MANUAL TRAINING FUND, and these answering defendants expressly allege that none of such funds, as such, were on de-

posit with the Bank of Winslow on October 4th, 1924, or at any other time material to this action and do further expressly allege that the said warrants with the exceptions of warrants Nos. 206, 205, 204, 172, 191, 183, 159, 184, 191, 173, 187, 186, 208, 211, 209, 180, 179, 185, 170, 152, 150, 157, 210, are not made in favor of the Bank of Winslow as payee and that therefore and thereby the said warrants except as to those made payable to the Bank of Winslow, are not receivable in payment of all debts to Navajo County, Arizona, as under the provisions of the laws of Arizona such were receivable in payment of debts and taxes due the County only from the person named therein as payee.

VI.

That the answering defendants deny that the plaintiff made due demand on the defendant J. S. Dodson as agent of the Superintendent of Banks in charge of the Bank of Winslow, to allow the said offset and on information and belief deny that any tender was made by the said plaintiff to the said Geo. J. Schaefer and further deny all the allegations of the Paragraph No. 6 of said First Amended Bill of Complaint of plaintiff except in so far as the same is admitted by other allegations of this answer.

VII.

These defendants expressly allege that all the County Warrants and Improvement Bonds which were pledged to secure deposits of Navajo County, Arizona, if any, were so pledged expressly and

only for the purpose of securing the said Navajo County for the excess of such deposit if any over and above the amount secured by the bond of Maryland Casualty with the express understanding that such pledge should remain in force and effect only so long as such deposit was in such excess and solely and only for such excess and that it was expressly understood by The Bank of Winslow and said Navajo County that when no such excess deposit existed then and in that event all such pledged property was to be returned to the Bank of Winslow and was to be free of any such pledge or obligation and that on the 4th day of October, 1924, there was only the sum of Twelve Thousand One Hundred Sixty-four and 20–100 ($12,164.20) Dollars on deposit in excess of the bond issued by Maryland Casualty Company and said sum being secured by such warrants and bonds and that therefore defendant Schaefer properly returned to defendant Dodson the bonds referred to in Paragraph Seven of First Amended Bill of Complaint, as there was left on hand in the possession of defendant Schaefer more than enough to cover the said excess deposit and these defendants expressly deny that any action on the part of defendant Schaefer operated to relieve the plaintiff from any liability whatsoever.

VIII.

That these defendants are entitled to the return from defendants George J. Schaefer, Treasurer and *Ex-Officio* Tax Collector of Navajo County, of all warrants and bonds held by him in excess of Twelve

Thousand One Hundred Sixty-four and 20–100 ($12,164.20) Dollars and that all such warrants and bonds in excess of said sum are not so pledged and are properly a part of the *corpus* of the Estate of The Bank of Winslow, an insolvent banking corporation, free and clear of all pledge or lien of pledge whatsoever and that if said defendant Schaefer has sold and disposed of such Warrants and Bonds in excess of said sum of Twelve Thousand One Hundred Sixty-four and 20–100 ($12,-164.20), Dollars he should be required to account to these answering defendants for such excess, but that these defendants leave plaintiff to strict proof of all such allegations as these defendants are without knowledge or information therein.

IX.

These defendants admit that certain warrants were pledged with the County Treasurer of Apache County, substantially as alleged in First Amended Bill of Complaint, but as to other allegations of Paragraph Numbered Ten of said First Amended Bill of Complaint these defendants leave the plaintiff to strict proof thereof and to the determination of this court.

X.

That except as hereinbefore expressly admitted, qualified or explained these defendants deny all the allegations of First Amended Bill of Complaint.

WHEREFORE, the answering defendants pray this Court:

1st: That the plaintiff take nothing by reason of this action and that the defendants have and recover of the plaintiff their costs and disbursements by reason of this action.

2nd: That defendant George J. Schaefer be required by and order of this Court to surrender to defendant A. T. Hammons, Superintendent of Banks of the State of Arizona, and J. S. Dodson, Special Deputy Superintendent of Banks of Arizona, all pledged bonds and warrants in the excess of the sum of Twelve Thousand One Hundred Sixty-four and 20–100 ($12,164.20) Dollars, now held by him from the Bank of Winslow.

3rd: That these defendants have all equitable relief in the premises.

SAPP & McLAUGHLIN,

Solicitors of the Defendants A. T. Hammons, Superintendent of Banks of the State of Arizona, and J. S. Dodson, Special Deputy Superintendent of Banks of Arizona.

O. K.—E. M. W.

DEFENDANTS' EXHIBIT "A."

REGISTERED WARRANTS OF NAVAJO COUNTY.

Reg. No.	Fund	Payee	Date Reg.	Amount	Int. To 2-23-25
262	Salary	J. E. Crosby	10- 4-24	$ 62.50	$ 1.51
261	Salary	Geo. Woolford	10- 4-24	37.50	.90
263	Salary	Harvey Ballard	10- 4-24	3.50	.09
256	Salary	John L. Fish	10- 3-24	8.00	.19
257	Salary	Fred Williams	10- 3-24	30.00	.72
252	Salary	L. D. Divelbess	9- 4-24	125.00	3.00
247	Salary	O. C. Williams	10- 1-24	75.00	1.81
207	Salary	J. F. Fish	9- 7-24	4.00	.11
206	Salary	J. O. Freeman	9- 7-24	7.50	.23
	Salary	Harvey Smithson	9-20-24	2.00	.05
	Salary	J. T. Cooper	9-20-24	5.00	.13
	Salary	Geo. Woolford	9-20-24	37.50	1.00
	Salary	R. L. Ison	9-20-24	4.00	.11
	Salary	R. L. Ison	9-20-24	4.00	.11

Reg. No.	Fund	Payee	Date Reg.	Amount	Int. To 2-23-25
246	Salary	L. F. McClanahan	9-27-24	32.50	.82
215	Salary	Harvey Ballard	9-15-24	3.50	.11
225	Salary	O. C. Williams	9-16-24	75.00	1.89
224	Salary	G. T. West	9-16-24	125.00	3.33
223	Salary	J. E. Crosby	9-16-24	62.50	1.68
199	Salary	O. C. Williams	9- 4-24	75.00	2.15
200	Salary	L. D. Divelbess	9- 4-24	125.00	3.58
201	Salary	D. W. Easley	9- 4-24	41.67	1.21
210	Salary	N. A. Peterson	9– 9–24	4.00	.11
209	Salary	Willard Whipple	9- 9-24	5.00	.14
208	Salary	George Woolford	9- 9-24	37.50	1.06
214	Salary	N. A. Peterson	9-11-24	4.00	.11
213	Salary	Jos. L. Peterson	9-11-24	4.00	.11
184	Salary	R. L. Ison	8-30-24	4.00	.12
187	Salary	J. E. Crosby	8-30-24	62.50	1.86

Reg. No.	Fund	Payee	Date Reg.	Amount	Int. To 2-23-25
186	Salary	D. W. Easley	8-30-24	41.67	1.24
185	Salary	J. W. Freeman	8-30-24	7.50	.24
182	Salary	A. B. Porter	8-29-24	2.00	.06
	Salary	Harvey Ballard	8-26-24	3.50	.12
173	Salary	Harvey Smithson	8-26-24	2.00	.06
171	Salary	Jos. L. Peterson	8-23-24	4.00	.12
178	Salary	C. E. Owens	8-20-24	50.00	1.56
179	Salary	J. L. Fish	8-20-24	4.00	.12
241	Salary	Harvey Ballard	9-19-24	3.50	.10
240	Salary	Fred Williams	9-19-24	30.00	.79
233	Salary	L. D. Divelbess	9-17-24	125.00	3.31
232	Salary	Thorwald Larson	9-17-24	83.34	2.23
231	Salary	D. W. Easley	9-17-24	41.67	1.11
212	Salary	L. H. Brewer	9- 9-24	1.25	.06
203	Salary	J. W. Bazell	9- 5-24	25.00	.71

Reg. No.	Fund	Payee	Date. Reg.	Amount	Int. To 2-23-25
202	Salary	Sam W. Proctor	9- 5-24	41.67	1.20
195	Salary	J. E. Walker	9- 3-24	100.00	2.88
194	Salary	L. C. Henning	9- 3-24	75.00	2.11
197	Salary	Thorwald Larson	9- 4-24	83.34	2.40
196	Salary	C. G. Payne	9- 4-24	41.67	1.21
238	Salary	Sam W. Proctor	9-19-24	41.67	1.10
237	Salary	Sam W. Proctor	9-19-24	41.67	1.10
234	Salary	L. C. Henning	9-18-24	75.00	1.97
229	Salary	C. G. Payne	9-17-24	41.67	1.11
228	Salary	J. E. Walker	9-17-24	100.00	2.65
172	Salary	L. H. Brewer	8-22-24	1.25	.06
253	Salary	L. C. Henning	10- 3-24	75.00	1.79
249	Salary	J. E. Walker	10- 2-24	100.00	2.40
217	Salary	A. B. Porter	9-17-24	2.00	.05
206	General	Holbrook Bch. B. of W.	10- 2-24	345.00	8.28

Reg. No.	Fund	Payee	Date Reg.	Amount	Int. To 2-23-25
205	General	Holbrook Bch. B. of W.	10- 2-24	4.70	.12
204	General	Holbrook Bch. B. of W.	10- 2-24	140.00	3.36
172	General	Holbrook Bch. B. of W.	9- 7-24	10.00	.28
198	General	Chas. F. Hansen	9-29-24	150.00	3.72
191	General	Holbrook Bch. B. of W.	8-22-24	829.00	25.57
183	General	Holbrook Bch. B. of W.	9-16-24	97.10	2.59
	General	Holbrook Bch. B. of W.	9-20-24	19.50	.52
159	General	Holbrook Bch. B. of W.	8-23-24	18.00	.56
	General	Holbrook Bch. B. of W.	8-30-24	47.30	1.39
184	General	Holbrook Bch. B. of W.	9-16-24	91.05	2.43
191	General	Holbrook Bch. B. of W.	9-19-24	150.00	3.93
	General	Bank of Winslow	9-20-24	15.00	.39
173	General	Bank of Winslow	9- 9-24	366.66	10.21
187	General	Bank of Winslow	9-18-24	15.00	.39
186	General	Bank of Winslow	9-18-24	177.23	4.65

Reg. No.	Fund	Payee	Date Reg.	Amount	Int. To 2-23-25
208	General	Bank of Winslow	10- 3-24	2,102.32	50.12
211	General	Bank of Winslow	10- 3-24	120.00	2.86
209	General	Bank of Winslow	10- 3-24	154.80	3.69
180	General	Bank of Winslow	9-17-24	25.80	.69
179	General	Bank of Winslow	9-17-24	280.00	7.42
174	General	Cooley Lumber Co.	9-11-24	86.26	2.37
158	General	Public School Pub. Co.	8-23-24	36.09	1.10
178	General	D. L. Younkin	9-15-24	250.00	6.71
237	Road	L. B. Owens	8-30-24	75.00	2.22
261	Road	L. B. Owens	9-17-24	75.00	1.99
260	Road	F. B. Gardener	9-17-24	75.00	1.99
259	Road	C. L. Rhoten	9-17-24	4.00	.11
	Road	Liona Penrod	9-20-24	35.00	.91
245	Road	Old Trails Garage	9- 9-24	1.50	.06
	Road	Carduff Trans. Co.	9- 9-24	10.00	.28

Reg. No.	Fund	Payee	Date Reg.	Amount	Int. To 2-23-25
256	Road	E. J. Larson	9-17-24	8.00	.21
265	Road	L. B. Owens	10- 2-24	75.00	1.80
	Road	A. T. S. F. Ry. Co.	9-20-24	36.00	.95
264	Road	Louis E. Johnson	9-29-24	19.25	.47
256	Road	J. W. Nikolaus	9-15-24	45.00	1.20
252	Road	John T. Flake	9-13-24	28.00	.78
251	Road	John T. Flake	9-13-24	27.00	.73
250	Road	Wayne Larson	9-13-24	25.00	.68
239	Road	S. P. Fish	9- 4-24	23.80	.69
240	Road	Chas. H. Turley	9- 9-24	28.00	.78
247	Road	Standard Oil Co.	9-11-24	54.03	1.49
246	Road	Union Oil Co.	9-11-24	37.37	2.70
248	Road	Wayne Webb	9-12-24	51.00	1.40
321	Expense	L. D. Divelbess	9- 7-24	24.00	.70
320	Expense	L. D. Divelbess	9- 7-24	500.00	14.08

Reg. No.	Fund	Payee	Date Reg.	Amount	Int. To 2-23-25
367	Expense	Elias Smith	9-19-24	5.20	.13
354	Expense	Navajo Garage	9-15-24	48.15	1.28
351	Expense	Louis Huckguey	9-13-24	122.80	3.34
350	Expense	Holbrook Ice & Supply	9-13-24	13.30	.36
349	Expense	Hol. Lt. & Pwr. Co.	9-13-24	11.30	.32
348	Expense	J. T. Cooper	9-13-24	5.20	.14
328	Expense	Bank of Winslow	9- 9-24	15.00	.42
326	Expense	A. & B. Schuster Co.	9- 9-24	24.70	.70
327	Expense	J. E. Crosby	9- 9-24	19.04	.53
325	Expense	Dr. John R. Walls	9- 9-24	26.00	.73
324	Expense	Dr. John R. Walls	9- 9-24	6.00	.17
343	Expense	Thorwald Larson	9-11-24	44.95	1.24
342	Expense	Standard Oil Co.	9-11-24	29.15	.80
341	Expense	Union Oil Co.	9-11-24	20.43	.58
340	Expense	Union Oil Co.	9-11-24	41.93	1.16

Reg. No.	Fund	Payee	Date Reg.	Amount	Int. To 2-23-25
339	Expense	Western Union Co.	9-11-24	18.38	.53
346	Expense	Mrs. May Thomas	9-12-24	3.20	.08
345	Expense	W. B. Woods	9-12-24	64.65	1.78
366	Expense	Mrs. Bertha Kirkland	9-19-24	5.00	.13
364	Expense	Dr. J. N. Heywood	9-17-24	120.00	3.18
363	Expense	Julia T. Fish	9-17-24	3.80	.11
347	Expense	Maria H. DeMartinez	9-12-24	40.00	1.10
344	Expense	Mtn. States Tele. Co.	9-11-24	25.55	.72
337	Expense	Carduff Transfer Co.	9- 9-24	6.39	.19
336	Expense	Old Trails Garage	9- 9-24	1.50	.06
335	Expense	Mail Publishing Co.	9- 9-24	18.00	.50
334	Expense	Mail Publishing Co.	9- 9-24	56.75	1.58
333	Expense	Mary G. Hungerford	9- 9-24	34.60	.98
316	Expense	C. G. Payne	9- 5-24	16.50	.49
355	Expense	Mrs. R. D. McGregor	9-15-24	37.00	1.00

Reg. No.	Fund	Payee	Date Reg.	Amount	Int. To 2-23-25
69	Indigent	Mrs. Ora Myers	9-15-24	25.00	.67
61	Indigent	Mrs. Helen Thysing	9- 9-24	10.00	.28
64	Indigent	Cornelia Atencio	9-11-24	10.00	.28
67	Indigent	Geo. Willis	9-12-24	10.00	.27
68	Indigent	Chas. Roberts	9-12-24	8.00	.22
66	Indigent	Carlos Baca	9-11-24	8.00	.22
65	Indigent	Mars Martinez Chavez	9-11-24	8.00	.22
63	Indigent	Luis Marales	9- 9-24	8.00	.22
62	Indigent	Pedro Roche	9- 9-24	8.00	.22
185	School Gen.	Holbrook Br. B. of W.	9-16-24	75.00	1.89
170	School Gen.	Holbrook Br. B. of W.	9- 4-24	75.00	2.15
152	School Gen.	Holbrook Br. B. of W.	8-18-24	76.72	2.43
150	School Gen.	Holbrook Br. B. of W.	8-18-24	90.00	2.84
151	School Gen.	Kate V. Kinney	8-18-24	75.00	2.37
176	School Gen.	Nav. Apa. Tele. Co.	9-12-24	9.60	.27

Reg. No.	Fund	Payee	Date Reg.	Amount	Int. To 2-23-25
177	School Gen.	Western Union	9-12-24	.72	.05
175	School Gen.	Holbrook Tribune	9-11-24	8.00	.22
157	Man. Train.	Holbrook Br. B. of W.	8-22-24	208.33	6.45
210	Man. Train.	Bank of Winslow	10- 2-24	165.00	3.75
	TOTAL			$10,922.44	$291.00

Interest accrual at the Rate of $1,83 per day from February 23d, 1925.

O. K.—E. M. W.

Regular October, 1924, Term—Phoenix.

In the United States District Court in and for the District of Arizona.

(Minute Entry of Thursday, February 26, 1925.)
HONORABLE F. C. JACOBS,
United States District Judge, Presiding.

(E.-93—Prescott.)

MARYLAND CASUALTY COMPANY, a Corporation,

Complainant,

vs.

A. T. HAMMONS et al.,

Defendants.

PROCEEDINGS OF HEARING ON APPLICATION FOR PRELIMINARY INJUNCTION, ETC.

Samuel L. Pattee, Esquire, appears on behalf of the plaintiff, and Messrs. Sidney Sapp and D. E. McLaughlin, appear for the defendants, A. T. Hammons and J. S. Dodson, and P. A. Sawyer, Esquire, appears for the defendant Navajo County.

On motion of counsel for the plaintiff it is ORDERED that Francis C. Wilson, Esq., be entered as associate counsel for the plaintiff.

Defendants' motion to dismiss the bill of complaint herein is heard and argued by respective counsel, whereupon, it is

ORDERED that said motion to dismiss be and the same is hereby denied on all grounds. Exception is entered to said ruling by defendants.

The application for preliminary or interlocutory injunction is now heard and argued by respective counsel, whereupon, it is

ORDERED that said application be and the same is hereby granted. The defendants except to said ruling of the Court.

It is now stipulated by and between the respective counsel in open court that the present bond is sufficient until the final determination of the matter, and thereupon, it is

ORDERED that further hearing or trial of this matter be and the same is hereby set for the 18th day of March, 1925.

O. K.—E. M. W.

Regular October, 1924, Term—At Phoenix.

(Minute Entry of Friday, March 13th, 1925.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

(Court and Cause.) E.-93—(Prescott.)

It is ordered that the order heretofore entered on February 26, 1925, setting this case for hearing on March 18, 1925, be and the same is vacated and set aside.

O. K.—E. M. W.

Regular October, 1924, Term—At Phoenix.

(Minute Entry of Saturday, March 21, 1925.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

The plaintiff's motion to require the defendants to produce certain papers, documents and books for inspection, comes on regularly for hearing, Samuel L. Pattee, Esq., appears as solicitor for the plaintiff, and D. E. McLaughlin, Esq., appears as solicitor for the defendants. The motion is duly heard and by the Court granted, counsel to prepare and present necessary order for signature of the Judge.

O. K.—E. M. W.

Regular March, 1925, Term—At Prescott.

(Minute Entry of Monday, July 6, 1925.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

Defendants' Motion to Dismiss First Amended Bill of Complaint comes on for hearing this date. No one appears for either party. Whereupon. said matter is submitted to the Court, and the Court having fully considered the same,

DOES NOW ORDER that said Motion be, and the same is hereby denied. Exception to said ruling of the Court is saved to Defendants.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Saturday, Dec. 5, 1925.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

(Court and Cause.) (E.-93—Prescott.)

W. E. Ryan, Esq., appears specially for the defendants. Francis Wilson, Esq., appears for the plaintiff.

IT IS ORDERED that this case be set for trial January 6th, 1926, at 10 o'clock A. M.

IT IS FURTHER ORDERED that this case be transferred to the Phoenix Division for trial.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Wednesday, Jan. 6, 1926.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

(Court and Cause.) (E.-93—Prescott.)

This cause comes on regularly for trial at this time and place. Samuel L. Pattee, Esquire, and F. E. Wilson, Esquire, appear for the plaintiff, D. E. McLaughlin, Esquire, appears for the defendants Hammons and Dodson. W. E. Ryan, Esquire, is present for the defendant Navajo County. Isaac Barth, Esquire, appears for Apache County, Intervenor. Henderson Stockton, Esquire, appears for Benjamin Brown, Jr., National Surety Company, and Fidelity and Deposit Company, Intervenors, and files Motion to intervene, and said

Motion is set for hearing at 11 o'clock A. M. this date.

On motion of Samuel L. Pattee, for the plaintiff, the Order to Show Cause is ORDERED discharged, said defendants Apache County and George Jarvis, County Treasurer, having filed complaint in intervention herein.

By consent of all counsel trial of this matter is continued to Thursday, January 7th, 1926, at 10 o'clock A. M., that stipulation as to certain matters may be agreed upon between counsel.

Subsequently, the application of Benjamin Brown, Jr., National Surety Company, and Fidelity and Deposit Company for permission to intervene comes on for hearing, Henderson Stockton, Esquire, appearing for the said intervenors.

Arguments of respective counsel are heard on said application to intervene and the objection of Navajo County, defendant to said application; whereupon, the Court being advised in the premises overrules said objection and enters the following Order granting said motion to intervene. Defendants except to said ruling.

(Here appears signed Order permitting Benjamin Brown, Jr., et al., to Intervene and plead.)

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Thursday, Jan. 7, 1926.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

(Court and Cause.) (E.-93—Prescott.)

This cause comes on regularly for trial this day, pursuant to recess. The following counsel are present: Francis E. Wilson, Esquire, and Samuel L. Pattee, Esquire, for the plaintiff; D. E. McLaughlin, Esquire, for the defendants A. T. Hammons, and J. S. Dodson; W. E. Ryan, Esquire, for the defendant Navajo County; Isaac Barth, Esquire, for the Intervenors Apache County and George Jarvis; Henderson Stockton, Esquire, for the Intervenors Benjamin Brown, Jr., National Surety Company, and Fidelity and Deposit Company of Maryland.

All parties announcing ready for trial the following proceedings are had:

D. A. Little is duly sworn as Court reporter. Plaintiff reads Bill of Complaint and makes statement of its case.

D. E. McLaughlin, Esquire, reads Answer of the defendants A. T. Hammons and J. S. Dodson. W. E. Ryan, Esquire, reads the Answer of the defendants Navajo County and George J. Schaefer. Isaac Barth makes statement of the case of the Intervenors Apache County and George Jarvis.

Henderson Stockton, Esquire, reads Answer and makes statement for the Intervenors Benjamin Brown, Jr., National Surety Company, and the Fidelity and Deposit Company of Maryland.

The defendants Navajo County and George J. Schaefer move for the dismissal of the complaint of the Intervenors Benjamin Brown, Jr., National Surety Company, and the Fidelity and Deposit Company of Maryland, whereupon,

IT IS ORDERED that said motion to dismiss is denied, and said defendants except to the ruling of the Court.

The defendants A. T. Hammons and J. S. Dodson join in the said motion to dismiss and except to the ruling denying the said motion.

PLAINTIFF'S CASE.

S. B. Smith is duly sworn and examined for the plaintiff.

Plaintiff's Exhibits 1 to 153 inclusive, are marked for identification.

George J. Schaefer is duly sworn and examined for the plaintiff.

Defendant's Exhibit "A" is marked for identification.

Plaintiff's Exhibits 154 to 163 are marked for identification.

Plaintiff's Exhibits Nos. 1 to 162, inclusive, are admitted in evidence and filed.

Defendant's Exhibits "B" and "C" are admitted and filed.

Time for adjournment having arrived, further trial is ORDERED recessed to 10 o'clock A. M., Friday, January 8th, 1926.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Friday, January 8, 1926.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

Respective counsel and all parties present pursuant to recess of yesterday, and proceedings of trial are now resumed.

PLAINTIFF'S CASE, Continued:

Examination of George J. Schaefer is now resumed.

Plaintiff's Exhibit No. 163 is now admitted in evidence and filed. A. T. Hammons, Defendant herein, is sworn and examined.

S. B. Smith is now recalled and examination is now had as to Apache County. Plaintiff's Exhibit No. 164 is admitted and filed.

Thereupon, the PLAINTIFF RESTS.

Defendants' original Motions to Dismiss case as to expense account warrants is now ORDERED DENIED. Exceptions entered for defendants.

Motion of the Intervenor Benjamin Brown, Jr., the National Surety Company, and the Fidelity and Deposit Company of Maryland, for Judgment in the case, is ORDERED DENIED. Exceptions entered for said Intervenors.

Motions of Intervenors Apache County to dismiss the complaint and for vacation of the restraining order is now ORDERED DENIED; exceptions entered for said Intervenor.

Motion of Navajo County to dismiss is ORDERED DENIED; exception entered for said Navajo County.

DEFENDANT'S CASE.

Miss Roberta Tandy is duly sworn and examined for the defendants.

J. S. Dodson, defendant, is duly sworn and examined.

Charles F. Oare is duly sworn and examined.

Whereupon, the hour of adjournment having arrived, further proceedings are Ordered continued to Saturday, January 9th, 1926, at 10 o'clock A. M.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Saturday, Jan. 9th, 1926.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

All parties are present and by respective counsel, whereupon, proceedings of trial are resumed, and further arguments of respective counsel are had before the Court upon the matters so presented.

Thereupon, further proceedings herein are continued to Monday, January 11th, 1926, at 10 o'clock A. M., of said day.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Monday, January 11, 1926.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

(Court and Cause.) (E.-93—Prescott.)

All parties are present and by respective counsel, whereupon, further proceedings of trial are resumed pursuant to recess heretofore taken, and further arguments of counsel on the matters before the Court are now heard.

The defendants now call A. C. Norton, who is duly sworn and examined.

The defendant Navajo County rests.

Defendant's Exhibit "E," which is subsequently corrected to "D," is admitted in evidence and filed.

A. T. Hammons, defendant, heretofore sworn and examined, is recalled for further examination. Thereupon, the defendant A. T. Hammons and J. S. Dodson REST.

The Plaintiff recalls George J. Schaefer for further examination.

The hour of adjournment having arrived, it is ORDERED that further proceedings be continued to 9:45 A. M., Tuesday, January 12, 1926.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Tuesday, January 12, 1926.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

(Court and Cause.) (E.–93—Prescott.)

All parties are present and by respective counsel, whereupon, further proceedings of trial are had pursuant to recess heretofore taken. Further arguments are had before the Court.

The Intervenor Apache County offers Exhibits Nos. 1 to 157, inclusive, which are admitted and filed.

IT IS ORDERED that Attorney Isaac Barth is permitted to withdraw said original exhibits upon the giving of proper receipt therefor, and to prepare and file instead certified copies thereof.

Thereupon, ALL PARTIES REST.

Arguments of Counsel for A. T. Hammons and Navajo County are now made to the Court, and the Court ORDERS that the matters stand submitted without further arguments.

ORDER allow five days and five days for filing of briefs.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Friday, February 12, 1926.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

(Court and Cause.) (E.–93—Prescott.)

ORDER FOR DECREE.

The Court renders a decree in favor of complainant allowing a set-off of the amount of General School Warrants $6,313.38; Salary Fund Warrants $2,311.04; Road Fund Warrants in the sum of $792.95; making a total of $9,417.37, together with interest from the date of the closing of the Bank of Winslow; that the improvement bonds of the Town of Winslow in the sum of $7,000.00 par value be returned by the defendant Hammons to the County Treasurer of Navajo County; that the amount thereof be set-off in favor of the plaintiff; making a total set-off of $16,417.37.

A decree in favor of Apache County and against the complainant as to the Navajo County warrants pledged to Apache County prior to the 4th day of October, 1924.

A decree in favor of intervening petitioner George Jarvis, Treasurer and *Ex-officio* Tax Collector of Apache County, and the intervening petitioners Benjamin Brown, Jr., the National Surety Company, and Fidelity and Deposit Company of Maryland, for the relief prayed for in their respective intervening petitions to the extent that the said George Jarvis, Treasurer of Apache County, shall retain possession of the registered warrants pledged to it; to apply the same in the manner pro-

vided and permitted by the nature and character of the pledge and by the law of Arizona.

That the restraining order heretofore entered be dissolved.

Dated this 12th day of February, 1926.

Thereupon, IT IS ORDERED BY THE COURT that exceptions to the findings of the Court be entered on behalf of all the parties to the action.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Tuesday, Feb. 23, 1926.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

(Court and Cause.) (E.–93—Prescott.)

On motion of D. E. McLaughlin, Esquire, appearing on behalf of defendants, it is

ORDERED that time of all defendants is hereby extended Twenty (20) days in addition to the time allowed by law within which to prepare, settle and file Bills of Exceptions herein.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Saturday, March 13, 1926.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

(Court and Cause.) (E.–93—Prescott.)

On motion of W. E. Ryan, Esquire, IT IS ORDERED that defendants, time herein to prepare,

settle and file Bill of Exceptions is hereby extended to and including the 29th day of March, 1926.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of Saturday, March 27, 1926.)

HONORABLE F. C. JACOBS,

United States District Judge, Presiding.

(Court and Cause.) (E.–93—Prescott.)

Will. E. Ryan, Esquire, appears for the defendant Navajo County, and on motion of said counsel, IT IS ORDERED that time of the defendant is extended ten (10) days from and after the 29th day of March, 1926, within which to prepare, serve, settle and file Bill of Exceptions herein.

O. K.—E. M. W.

The United States District Court for the District of Arizona.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect, and complete copy of Minute Entries in case No. 93–Equity (Prescott), Maryland Casualty Company, Plaintiff, vs. A. T. Hammons, et al., Defendants, for dates as follows: February 26, March 13, 21, July 6, December 5, 1925, January 6, 7, 8, 9, 11, 12, February 12, 23, March 13, and 27th, 1926, as the same appears from the original record remaining in my office.

WITNESS my hand and the seal of said Court this 10th day of April, 1926.

[Seal] C. R. McFALL,
Clerk.
By M. R. Malcolm,
Deputy.

O. K.—E. M. W.

STATEMENT OF EVIDENCE UNDER EQUITY RULE No. 75.

BE IT REMEMBERED that the trial of the above-entitled cause came on regularly to be heard before the Honorable F. C. Jacobs, Judge of the District Court of the United States in and for the District of Arizona, sitting without a jury, at the court rooms of said court in the Federal Building, City of Phoenix, State and District of Arizona, on this 7th day of January, 1926, at 10:00 o'clock A. M.

Francis C. Wilson, Esq., and Messrs. Curley & Pattee appearing as counsel for the plaintiff; Messrs. Sapp & McLaughlin appearing as counsel for the defendants, A. T. Hammons and J. S. Dodson; W. E. Ryan, Esq., John W. Murphy, Esq., Attorney General of the State of Arizona, and P. A. Sawyer, Esq., County Attorney of Navajo County, State of Arizona, appearing as counsel for the defendants, George J. Schaefer, and Navajo County, Isaac Barth, Esq., and Maurice Barth, Esq., County Attorney of Apache County, State of Arizona, appearing as counsel for Intervenors George Jarvis and Apache County; Messrs. Stockton & Perry and Thomas A. Flynn, Esq., appearing as counsel for

Intervenors Benjamin Brown, Jr., National Surety Company and Fidelity & Deposit Company of Maryland.

BE IT REMEMBERED ALSO that the pleadings of the parties plaintiff and original defendants were then read to the Court, and that a stipulation entitled in the cause, but not signed, was read to the Court and stipulated as true by the plaintiff and the original defendants, in words and figures as follows, to wit:

The parties in interest, through their respective attorneys and subject to such objections as may be urged as to the relevancy, materiality and competency of any of the facts hereinafter and subject to such motions to strike as might be made to include any of the facts referred to in connection with facts shown by evidence, agreed as follows:

That the first paragraph of the amended bill is true; that the allegations of paragraph II, of the amended bill is true; that the allegations of paragraph III, of the amended bill are true as of the date when the complaint was filed; agree that at the date of the suspension of the Bank of Winslow there was on deposit to the credit of Navajo County the sum of fifty-one thousand two hundred nine and 75–100 dollars ($51,209.75), of which fifteen thousand ($15,000.00) dollars was inactive funds which had been in the bank from prior to January 1, 1923, and the balance was active funds of said county; that the remaining allegations of paragraph IV are subject to proof except as to items of figures and amounts hereinafter specified; that the allega-

tions of paragraph V are correct in figures as to amount of warrants hereinafter stated; that it is admitted that at the time of the suspension of The Bank of Winslow the Superintendent of Banks came into possession of registered warrants of Navajo County to the amount of ten thousand nine hundred twenty-two and 44–100 ($10,922.44) dollars; that at said date there was in the possession of the County Treasurer of Apache County the sum of eight thousand one hundred ten and 38–100 ($8,110.38) dollars of registered warrants of Navajo County, and that on said date there was in the possession of George Schaefer, County Treasurer of Navajo County, seven thousand three hundred seventy-nine and 40–100 ($7,379.40) dollars registered warrants of Navajo County. These amounts represent the aggregate of all of the warrants of Navajo County in dispute in this case.

The parties are left to prove as to the manner in which said warrants got into the hands of the respective counties or the respective county treasurers and the purpose for which and the conditions upon which they are held.

That at the date the Bank of Winslow closed its doors defendant George Schaefer was in possession of twelve thousand five hundred nineteen and 60–100 ($12,519.60) dollars of improvement bonds of the T*wo*n of Winslow; that on October 23, 1924, seven thousand dollars ($7,000.00) of those bonds were returned to the Assistant Bank Examiner Dodson and five thousand five hundred nineteen and 60–100 ($5,519.60) dollars were sold by defendant Schae-

fer; that defendant Schaefer also liquidated the registered warrants referred to as placed in his hands by The Bank of Winslow, the above seven thousand three hundred seventy-nine and 40–100 ($7,379.40) dollars of said warrants and the proceeds of such sale and liquidation was applied on the total deposit of the county with the Bank of Winslow of above fifty-one thousand two hundred nine and 75–100 ($51,209.75) dollars as to be a credit thereon. It is not intended by the parties hereto to stipulate as to any fact bearing upon the terms, conditions or purposes of any arrangement under which the above warrants and improvement bonds came into the possession of the Treasurer of Navajo *Count,* leaving all such matters subject to such proofs and objections thereto as may be offered on the trial.

Mr. WILSON.—Mr. Ryan calls my attention to the fact that we apparently stipulated—I do not remember just how that came up—but that these warrants, all of them came into the possession of the Bank of Winslow prior to its closing in the ordinary and usual course of business which is pursuant to the law of Arizona with reference to the handling of warrants.

TESTIMONY OF S. B. SMITH, FOR PLAINTIFF.

S. B. SMITH, who was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination by Mr. WILSON.

I am Deputy Bank Examiner and have charge of the records of the Bank of Winslow at this time. I succeeded Mr. Dodson, former deputy in charge of the Bank of Winslow; he turned over the documents and papers of the bank when he went out. I produce the warrants which came into my hands at that time.

(Witness produces documents which are marked for identification, in numerical order, "Plaintiff's Exhibit I," etc.)

TESTIMONY OF GEORGE J. SCHAEFER, FOR PLAINTIFF.

Thereupon, Mr. GEORGE J. SCHAEFER was called as a witness for the plaintiff, and being first duly sworn, testified as follows:

I am Treasurer of Navajo County; went into office the 1st of January, 1923, and have continued as such officer ever since. As such Treasurer I had in my possession records of that county with reference to the deposits of the county in the Bank of Winslow, and other records in connection with that transaction. I produce receipts and other docu-

(Testimony of George J. Schaefer.)

ments in connection with those deposits with that bank before it closed October 4, 1924. Letter dated March 17, 1924, from the Bank of Winslow, signed B. B. Neel, is a letter transmitting $2,839.24 of county of Navajo warrants received by me for the bank. (Letter marked for identification as Plaintiff's Exhibit.)

Mr. WILSON.—Perhaps I could go on with something else just temporarily.

Q. Mr. Schaefer, I hand you list of warrants purporting to be the warrants issued by Navajo County and registered between October 4, 1923, to October 4, 1924, as unpaid October 4, 1924, and will ask you if those lists were made in your office and if they correctly state the condition of your registration book on the subject for the period covered by them?

A. They were made in my office and I believe them to be correct.

Mr. WILSON.—If it pleases your Honor, I will ask the Clerk to mark for identification the four lists that have been identified by the witness as correct copies of his records.

The CLERK.—159.

(The other exhibits heretofore offered by plaintiff were marked from 1 to 158 inclusive.)

Mr. ISAAC BARTH.—If the Court please, I would like to ask counsel if the warrants held by Apache County are included in that list?

Mr. WILSON.—No. Some are. I will get those out later. About six, I think.

(Testimony of George J. Schaefer.)

(Thereupon, the four exhibits last offered were marked Plaintiff's Exhibits 159, 160, 161 and 162.)

Mr. WILSON.—Q. Mr. Schaefer, I hand you letter dated March 20, 1924, on the Bank of Winslow to you as County Treasurer, signed by the vice-president, and ask you if that was received by you?

A. It was.

Mr. WILSON.—Mark for identification this letter.

The CLERK.—No. 163.

Mr. WILSON.—Q. Mr. Schaefer, I hand you Plaintiff's Exhibit 162, warrants issued by Navajo County, Arizona, on the road fund registered October 4, 1923, to October 24, 1924.

The COURT.—Bonds, you say?

Mr. WILSON.—Registered warrants.

The COURT.—Warrants.

Mr. WILSON.—Yes, sir,—and will ask you of on October 4, 1924, you had sufficient money in that fund to pay those warrants?

Mr. RYAN.—Wait a minute. There is no allegation in the complaint to the contrary but what all of these—. That is already admitted that they were all registered warrants. As a matter of law, they are registered warrants until they are called by notice, which gives every registered warrant holder in the order of registration a right to payment. It is immaterial under the state of the admissions and the pleadings in this case whether he has other funds or any funds at all to pay these

(Testimony of George J. Schaefer.)

road warrants. They were registered warrants. They are in this case but registered warrants, registered, with all that the law implies and limits as to the payment of those classes of warrants.

(Arguments by Mr. WILSON and Mr. RYAN.)

The COURT.—The objection is overruled. Do you want an exception?

Mr. McLAUGHLIN.—Note an exception by Hammons and Dodson.

Mr. RYAN.—I should like to present some authorities in support of that.

The COURT.—I don't think I would care to listen to any.

Mr. RYAN.—I take an exception for the reason that—assigning the reason that it is a line of evidence that is not within the pleadings and contrary to the stipulated facts and the character of these warrants.

The COURT.—You already have that in your objection for the record.

Mr. RYAN.—What?

The COURT.—I say, you have stated the grounds of your objection already in record. Proceed, Mr. Wilson.

A. I did. It is in the road fund.

Mr. McLAUGHLIN.—If your Honor please, we urge also that the best evidence as to the funds available by the county at that time would be the books of the county themselves and the official records should be produced.

Mr. WILSON.—In answer to that, if your Honor

(Testimony of George J. Schaefer.)

please, I asked the Treasurer if he knew whether he had, as treasurer, sufficient money to pay these warrants.

The COURT.—He may answer yes or no whether he knows.

A. Yes.

Mr. WILSON.—Q. Mr. Schaefer, you did have on that date sufficient money to meet those warrants, and, if the bank had been open, you could have drawn on the bank for the amount of that total, $1,861.60?

A. That is, on the road fund?

Q. On the road fund.

A. Yes, sir.

Q. I now hand you Plaintiff's Exhibit for identification marked 160 and will ask you if on the 4th day of October, 1924, you had sufficient funds in the salary fund to take up all of the warrants listed upon that list?

Mr. RYAN.—Same objection, if your Honor please, as to the books being the best evidence and irrelevant, incompetent and immaterial for the reason urged.

The COURT.—Objection is overruled.

Mr. RYAN.—Note an exception.

Mr. McLAUGHLIN.—Exception on behalf of Hammons and Dodson.

A. I did.

Mr. WILSON.—Q. If the Bank of Winslow, on the 4th day of October, 1924, had been open and transacting business, could you have drawn upon

(Testimony of George J. Schaefer.)
that bank a check in payment of those warrants in the sum of $4,469.58?

A. I could.

Mr. WILSON.—He said yes, sir. Q. Mr. Schaefer, I hand you Plaintiff's Exhibit No. 161, marked for identification and will ask you if you had on hand on October 4, 1924, sufficient funds to pay all of the outstanding school warrants at that date registered and these included in this list?

A. Yes, I did.

Mr. WILSON.—I now offer in evidence—

Mr. RYAN.—May it be understood your Honor, that the same objection goes to these as before, so that I won't have to object.

The COURT.—Yes, and the same ruling.

Mr. RYAN.—Save an exception.

Mr. McLAUGHLIN.—Of all the defendants.

Mr. WILSON.—I now offer in evidence school warrants introduced as Plaintiff's Exhibit 1 to 24.

The COURT.—Inclusive?

Mr. WILSON.—Inclusive. This is the road fund warrants marked Plaintiff's 25 to 44 inclusive and expense warrants marked 43; Plaintiff's Exhibits 43 to 95 inclusive.

The CLERK.—45 to 95.

Mr. WILSON.—45 to 95. Pardon me. Plaintiff's Exhibits from 96 to 153.

The COURT.—What is that?

Mr. WILSON.—Inclusive.

The COURT.—Expense warrants?

Mr. WILSON.—The 45 to 95 were expense warrants. 96 to 153 were salary warrants.

The COURT.—On the road.

Mr. WILSON.—Yes, sir.

The COURT.—That is the road?

Mr. WILSON.—And the road warrants were from 25 to 44 inclusive. School warrants were from 1 to 24 inclusive.

The COURT.—What are the others?

Mr. WILSON.—Expense warrants were from 45 to 95 inclusive and the salary warrants were from 96 to 153 inclusive.

The COURT.—Any objections?

Mr. RYAN.—Is he offering them now in evidence?

Mr. WILSON.—I am offering them now in evidence.

Mr. RYAN.—I would like to have the privilege of looking at them, so that I can make my objection.

The COURT.—Didn't you folks see those warrants during the recess?

Mr. RYAN.—We did not.

Mr. WILSON.—*The* have been in your possession all of the time, Mr. Ryan.

Mr. RYAN.—Warrants? Not these.

Mr. WILSON.—Your witness—your client.

Mr. ISAAC BARTH.—They were being marked by the Clerk.

Mr. RYAN.—I mean the list you are offering in evidence.

Mr. WILSON.—I am not offering the list yet, just these warrants.

(Exhibits handed to counsel for defendants.)

The COURT.—What is the total amount of all those bonds? Can you tell?

Mr. WILSON.—Total of those pledged to the county?

The COURT.—Well, those that the witness has testified he had funds to pay at that time.

Mr. WILSON.—There are twenty—possibly twenty-three thousand—just about twenty-three thousand dollars of warrants.

Mr. ISAAC BARTH.—The witness indicates that that is not correct.

Mr. WILSON.—Well, that does not include the bonds—I guess I misunderstood your Honor. Those that he said he had money to pay that you want?

The COURT.—Yes, sir.

Mr. WILSON.— $17,203.75 not including interest.

The COURT.—Well, is there any objection to the introduction of those warrants?

Mr. RYAN.—Same objection that goes to the line of proof. It opens up a different question—any question connected with the ability to pay those warrants.

The COURT.—Your objection is overruled.

Mr. McLAUGHLIN.—Which objection is joined in by all the defendants and exception noted on behalf of all of them.

(Testimony of George J. Schaefer.)

Mr. RYAN.—Exception requested, your Honor.

Mr. WILSON.—I now offer in evidence plaintiff's—the last number on that was Plaintiff's Exhibit marked for identification 154. I would like to read it to your Honor.

Mr. McLAUGHLIN.—May we see that before it is read, Mr. Wilson, so we can interpose an objection, if necessary?

(Exhibit handed to counsel for defendants.)

Mr. RYAN.—The objection to this receipt is that under date of April 23d, it appears to be something signed by Mr. George J. Schaefer that he received from the Arizona State Bank of Winslow, thirty-five improvement bonds of the Town of Winslow and there is no showing that The Bank of Winslow that is now defunct had any connection or interest in those bonds or with that deposit.

Mr. WILSON.—I will now show that connection. I did not suppose that counsel would question the fact that the Bank of Arizona was merged with the Winslow State Bank before this transaction—before it closed and all these assets and everything else went into The Bank of Winslow. If they are going to ask me to prove it, I will go ahead and prove it. That will just take a few questions, if your Honor please, to try to get that in.

Q. Mr. Schaefer, I hand you Plaintiff's Exhibit No. 154 marked for identification—I will withdraw that offer at this time, Mr. Reporter—and will ask you how that came into your possession?

(Testimony of George J. Schaefer.)

A. Came to me from the Arizona State Bank on receipt of that many bonds as noted there.

Q. And what happened thereafter with the deposit of that bank as shown by your books?

Mr. RYAN.—The books are the best evidence, your Honor, as to that.

Mr. WILSON.—Well, take out your books.

Mr. RYAN.—I move to have the answer stricken out.

The COURT.—There is no answer to the question.

Mr. RYAN.—What?

The COURT.—He has not answered the question.

Mr. RYAN.—I thought he had answered it.

Mr. WILSON.—Q. I will ask you to state from your book that you have just taken from your files what your books show in that connection?

A. In regard to the title of the bank?

Q. Did you carry an account with the Bank of Arizona? A. Arizona State Bank.

Q. Arizona State Bank at the time that this receipt was given, April 23, 1923? A. I did.

Q. Will you state what the amount was as shown by your books? A. At that time?

Q. Yes. A. My ledger don't go back that far.

Q. Will you state what occurred to that account as shown by your books?

A. That account was transferred to the Bank of Winslow after the merger.

The COURT.—I can't hear you.

Mr. RYAN.—Wait a minute.

(Testimony of George J. Schaefer.)

A. The account was transferred to The Bank of Winslow after the merger in May, 1924.

Mr. WILSON.—That is shown by your ledger account of Arizona State Bank? A. Yes, sir.

Q. What was the balance as shown by your books at the time of the transfer to The Bank of Winslow?

A. $17,927.19.

Q. What date was that?

A. September 1.

Q. What year? A. 1924.

Q. Did you continue to hold these bonds after that date as security for—

Mr. RYAN.—Well—

Mr. WILSON.—Well, never mind.

Q. You continued to hold these bonds after that, Mr. Schaefer? A. I did.

Q. Did the Bank of Winslow ever raise any objection to your holding them during the time that it was open? A. None.

Mr. McLAUGHLIN.—Now, if your Honor please, we object to that and move to strike the answer on the ground that there is no showing in the evidence as yet that the Bank of Winslow had any right to object to something that somebody else had put up to secure somebody else's liability.

The COURT.—*The* were transferred from the—

Mr. McLAUGHLIN.—There is no showing that *that* these bonds were ever transferred to the Bank of Winslow or that the Bank of Winslow got them.

The COURT.—He just testified that the whole

(Testimony of George J. Schaefer.)

account of the bonds were transferred in the merger.

Mr. McLAUGHLIN.—I believe, your Honor, that the witness inadvertently, perhaps, used the word "merger" but there is no evidence that these bonds were ever merged. What he testified to was that the account was afterwards transferred to the Bank of Winslow. That is what he said. Now, the account being transferred, does not necessarily transfer these bonds.

Mr. WILSON.—If the Court please, they were negotiable bonds, as shown by the character of them, and he held them and continued to hold them. Of course, we can prove the merger, if the Court please, by simply putting Mr. Hammons on the witness stand, if counsel wants to take the Court's time and our time to prove that merger.

The COURT.—It is just a question of orderly proof. The objection is overruled.

Mr. McLAUGHLIN.—Note an exception. We are perfectly willing for counsel to prove anything that he deems necessary and we are not waiving anything in that line.

A. Plaintiff's Exhibit 154, marked for identification, came to me from the Arizona State Bank on receipt of that many bonds as noted there.

Mr. WILSON.—I will now offer in evidence Plaintiff's Exhibit No. 154.

Mr. RYAN.—No further objections to it except those already noted.

Mr. WILSON.—No further objections?

(Testimony of George J. Schaefer.)

The COURT.—No further objection.

Mr. WILSON.—I now offer in evidence Plaintiff's Exhibit No. 155 as Plaintiff's Exhibit No. 155.

Mr. RYAN.—As far as I understand, there is no showing that any of the warrants involved in this case are the warrants involved—described in this so-called receipt and the further objection that any receipt given by Mr. Schaefer creating a—accepting securities of any kind as a guarantee is without authority of law, which can only come from the Board of Supervisors and also that it shows other securities which were given at the same time.

Mr. WILSON.—If the Court please, this is crossed off, the other securities he refers to.

The COURT.—The objection is overruled.

Mr. RYAN.—Exception.

Mr. McLAUGHLIN.—I would like the record to show that the objection was concurred in by the other defendants Hammons and Dodson and an exception taken in their behalf.

Mr. WILSON.—I now offer in evidence Plaintiff's Exhibit No. 156, being the receipt by the County Treasurer of certain warrants.

Mr. RYAN.—Same objection.

Mr. McLAUGHLIN.—By all the defendants.

Mr. RYAN.—Same objections, *with* enumerating them.

Mr. WILSON.—That is another receipt of the same character.

The COURT.—The objection is overruled.

(Testimony of George J. Schaefer.)

Mr. McLAUGHLIN.—Exception by all defendants.

Mr. WILSON.—I now offer in evidence Plaintiff's Exhibit No. 157, being the letter from George J. Schaefer to Charles F. Oare, Cashier of the Arizona State Bank, acknowledging receipt of $2,583.37 in registered county warrants. I think before I offer that, I will go a little further.

Q. I hand you, Mr. Schaefer—I withdraw that offer—a letter dated October 18, 1923, and will ask you whether you held those warrants as security for the Arizona State Bank funds transferred to the Bank of Winslow, as you have already testified, at the time that the Bank of Winslow closed its doors on October 4, 1924?

A. I did.

Mr. RYAN.—Same objection.

Mr. WILSON.—I now offer in evidence Plaintiff's Exhibit No. 157, being the letter referred to by the witness.

Mr. RYAN.—That is the same objection that these securities were put up to the Arizona State Bank, no showing that there was any connection between the two.

The COURT.—Objection overruled.

Mr. McLAUGHLIN.—Objection was concurred in by all defendants and we note an exception.

Mr. WILSON.—I now offer in evidence Plaintiff's Exhibit No. 158, being a letter dated March 17, 1924, signed by V. B. Neil (?), Vice-President of the Bank of Winslow, addressed to Mr. Schaefer

as Treasurer, in which he acknowledges receipt of registered warrants as per list enclosed aggregating $2,839.24 as in aggregate of county funds deposited in the Bank of Winslow. I might state that the offer of this letter is limited to the proof that the Bank of Winslow did not limit the pledge of this collateral, as alleged by the other side, and deposited them as collateral for the entire funds of the county in that bank.

Mr. RYAN.—Same objection that I interposed.

The COURT.—What is the letter? Read it.

Mr. WILSON.—The letter says: "Mr. George Schaefer, Treasurer, Holbrook, Arizona. We are enclosing herewith registered warrants as per list enclosed aggregating $2,839.24. These, you will kindly hold as a guarantee of county funds deposited in the Bank of Winslow and return to us Panama Canal Bond for $1,000.00. Also kindly sign the enclosed receipt and hold the copy for your records."

The COURT.—I see. The Panama Canal bond was supposed to have been delivered on the other.

Mr. WILSON.—Yes, sir, and was returned as shown by the letter already in evidence.

The COURT.—The objection is overruled.

Mr. RYAN.—Note an exception for the—

Mr. McLAUGHLIN.— —for all defendants.

Mr. WILSON.—I now offer in evidence Plaintiff's Exhibit 160 being a list of warrants issued by Navajo County on the salary fund to which the witness has already testified as Plaintiff's Exhibit 160.

Mr. RYAN.—Same objection as to that entire line of proof, that it is incompetent, irrelevant and immaterial.

The COURT.—What are those?

Mr. WILSON.—Those are the warrants to which the witness testified that it represents a correct list of those in his office and that he had funds on hand to pay for and would draw upon the bank for the payment.

The COURT.—Objection is overruled.

Mr. WILSON.—I offer in evidence Plaintiff's Exhibit 161, being warrants issued by the County Superintendent of Schools on the school fund of Navajo County, Arizona, as previously identified by the witness.

Mr. RYAN.—Same objection that I am making to this same line of proof.

The COURT.—Objection is overruled.

Mr. McLAUGHLIN.—Note an exception for all of the original defendants in the case.

Mr. WILSON.—I now offer in evidence Plaintiff's Exhibit No. 162, being a list of warrants issued by Navajo County on the road fund heretofore identified by the witness.

Mr. RYAN.—Same objection that I am making to this class of testimony.

The COURT.—Same ruling. It is overruled.

Mr. RYAN.—Note an exception for all of the defendants.

Mr. WILSON.—I now offer in evidence Plaintiff's Exhibits No. 159, which I offer as subject to

the general rule of the general laws of Arizona on the subject of set-off, it not being covered by the character of proof which I have adduced in connection with the three preceding exhibits.

The COURT.—What is it?

Mr. WILSON.—That is warrants on the expense fund amounting to $6,636.12.

The COURT.—Same objection, I presume?

Mr. RYAN.—Incompetent, irrelevant and immaterial, subject to the same objection as I am interposing to this line of proof.

The COURT.—The objection is overruled.

Mr. McLAUGHLIN.—And, if your Honor pleases, we further object that these are not the original records and not the best evidence—these lists.

Mr. WILSON.—He has identified them as correct copies of his records. Counsel agreed with me yesterday that they would go in if that proof was made.

Mr. RYAN.—Just a minute, if your Honor please. I made some agreements yesterday and orally in the proof—orally in the trial of this case outside of this written stipulation that is already in, I tried to hold counsel to it to put in certain things. He has, aside from what is already in the record as valid and binding admissions, he has departed from them. He has opened up a new channel.

Mr. WILSON.—To the extent of asking that these warrants be marked exhibits.

Mr. RYAN.—Now, as far as I am concerned, I

do not feel that I am morally bound by any verbal stipulation not already in the record nor beyond what has been read into the record and consented to by me. I don't believe I am.

The COURT.—I don't know anything about your stipulation of your agreement. What is the objection; that it is not the best evidence?

Mr. WILSON.—That is the objection and the witness has testified that this is the correct copy of his records. I will put the records all in and then he can check them, if it would please counsel any. I don't see the extent, though. It seems to me that the record is sufficient.

The COURT.—Do you know whether or not it is correct or not?

Mr. RYAN.—If your Honor please, I have tried to get this County Treasurer, who, as an officer of Navajo County, is one of my clients from last September to give me information to prepare for this case and I find him more willing on the witness stand to give everything to the plaintiff in the case and not one single thing to the Receiver, the Bank Examiner or to the Attorney General or myself in regard to it.

The COURT.—That is not the question I asked you.

Mr. RYAN.—I don't know anything to be exact, your Honor. I don't know, and I have not been able to find out from this Treasurer from way along last September.

(Testimony of George J. Schaefer.)

The COURT.—Didn't I understand a moment ago from counsel that you had an oral understanding yesterday as to the—

Mr. WILSON.—Yes, sir, that was counsel's statement. Now, he says—

Mr. RYAN.—As to certain features of it.

Mr. WILSON.—Now, he says, because I asked to have these warrants marked as Exhibits and introduced them as such that I have breached some agreement with him. I don't remember that I made any agreement that I would not do that but the agreement was and he has already verified that fact that these lists would be taken as correct statements of the contents of Mr. Schaefer's books and would be put in as such so as to prevent me having to spend two days checking every one of these warrants—checking them off and introducing them.

The COURT.—Q. Have you checked that from your books, Mr. Schaefer?

A. Yes, about a year ago, though.

Mr. WILSON—I checked them very carefully, if the Court please. I myself went over and examined these records.

The COURT.—The objection is overruled.

Mr. McLAUGHLIN.—Note an exception on behalf of all defendants.

The COURT.—That is 159?

Mr. WILSON.—Yes, sir, that is 159.

Mr. RYAN.—An exception.

Mr. WILSON.—That is all, if the Court please, as far as this witness is concerned.

(Testimony of George J. Schaefer.)

Cross-examination by Mr. ISAAC BARTH, Attorney for George Jarvis and County of Apache, Intervenors.

Q. Mr. Schaefer, you testified that you had money on hand to pay these warrants—you had funds on hand to pay these warrants?

A. These particular amounts.

Q. That is, not these particular warrants, but this amount? A. Yes. That is about all there was.

Q. By that, you mean that if these had been presented, you would have had money to have paid these off — if somebody else had presented that amount of warrants?

A. No, I had an agreement with the bank that I would take these warrants that they held immediately after the Board meeting on the 6th of October, after I made my report to the Board of Supervisors.

Q. That is, you agreed with them that you would take these?

A. Purchase all of the registered warrants they held in certain accounts.

Q. That you would take the bank's warrants?

A. Yes, sir.

Q. Regardless of the fact that other warrants were registered ahead of those warrants?

A. There was none.

Q. There was none others registered ahead?

A. That is all on these particular funds. The expense fund, of course, that is another fund. I did not have any money in the expense fund at all.

(Testimony of George J. Schaefer.)

Q. Did you have just the money in the general fund to pay them with? A. No.

Q. It had been distributed to the respective funds on which these warrants were drawn?

A. That is, as far as the account is concerned.

Q. As far as what?

A. The account is concerned.

Q. It had not been authorized by the Board—

* * * *

Mr. BARTH.—I was under the impression and I was somewhat perturbed by a remark as to the stipulation relative to my procedure, but I am glad at least that the Court is with me. What did I ask the last?

The REPORTER.—(Reading:) "It had not been authorized by the Board—"

Mr. BARTH.—Q. —that is, there had been no apportionment of these respective funds of the money that you held?

A. There had been at that time, the last of September.

Q. Was there enough money in the salary fund in your possession at that time to pay all outstanding registered warrants? A. No.

Q. Was there sufficient money in the road fund at that time to pay all outstanding warrants?

A. Yes.

Q. Was there enough money in the school fund of the respective school districts to pay outstanding school warrants? A. Yes.

(Testimony of George J. Schaefer.)

Q. All of them? What was true of the other funds? A. They were short.

Q. All of the others? Then, there was only money enough to pay the money in what funds?

A. There was enough to pay all road warrants, all school warrants and part of the salary—most all of the salary warrants but not quite all—$5,000.00 worth of them.

The COURT.—Q. How about the expense?

A. That fund had never had any money in it.

Q. How many funds have you outside of the school funds?

A. Just the general accounts? Not district accounts?

Q. Outside of the district accounts is what I mean.

A. I have school, road, salary and expense funds is about all. Those are the big funds that amount to anything.

Q. You had money enough only to pay the—that is, the—will you read it, so that I won't misquote?

A. I told the Bank of Winslow I would take all of the road warrants.

Q. No, not what you told the bank but what you had.

A. I had sufficient money to buy all road warrants, all school warrants and $5,000.00 of salary warrants and no money for expense warrants.

Q. That is all, that is, you mean by that that you had enough money in those funds to pay all outstanding warrants against those particular funds?

A. That is it.

(Testimony of George J. Schaefer.)

Mr. RYAN.—Q. And, did you tell him that?

A. At that time.

Q. Well, what time?

A. Somewhere about the first of October.

The COURT.—Q. Is that $5,000.00 of salary warrants?

A. Yes, sir.

* * * *

Cross-examination by Mr. RYAN.

Q. Mr. Schaefer, between the 1st and the 4th of October, 1924, you registered some $5,000.00 worth of warrants for the Bank of Winslow, did you not?

A. Yes, sir. I don't know now. I registered some, but I don't know how many.

Q. Isn't it a fact, to your knowledge, that you registered all of the warrants described in the complaint as being warrants in transit except one of about seven hundred and some odd that was being—

A. I don't know about the transit warrants.

Q. You registered some $5,000.00 between the 1st and the 4th, didn't you?

A. If you would let me see that, I can give a better idea between that and the books, that is, to—

Q. Wait a minute. You don't remember independently? Don't you know that there was many thousand dollars of warrants registered and outstanding other than those held by the Bank of Winslow on the 14th day of October, 19—.

A. Yes, sir.

(Testimony of George J. Schaefer.)

Mr. WILSON.—If the Court please, I object to this line of testimony, because there is no question in the record on that point, we having stipulated that these are all registered warrants and it is immaterial when they were registered. They were all registered warrants and we have stipulated that fact and any testimony on that point before this court is wasting the court's time and our time and I object to it as immaterial.

Mr. RYAN.—That these are all registered warrants, yes?

Mr. WILSON.—Yes.

Mr. RYAN.—But I have made a defense in my pleadings to the effect that there were other large—a large number of other outstanding registered warrants on these same funds on the 4th of October.

Q. Now, that is correct, is it not? A. Yes, sir.

The COURT.—The objection is overruled. He may answer.

Mr. RYAN.—Q. And it is a fact that a large number of these same warrants were still outstanding about the 1st of July, 1925?

A. Which ones?

Q. Well, of the same registered warrants that were registered and outstanding on October 4, 1924?

A. Yes.

Mr. WILSON.—Objected to as immaterial, if the Court please. I can't see the materiality.

Mr. RYAN.—Now, the date—

Mr. WILSON.—Just a minute, please, Mr. Ryan.

The date is material if it was October 4, 1924. What happened later than that is immaterial. He did not pay these warrans. They must have been outstanding, because he was enjoined from paying them.

The COURT.—I did not hear the date embodied in your question.

Mr. WILSON.—July 1, 1925.

The COURT.—How is that material—1925—what was outstanding in 1925?

Mr. RYAN.—They are asking that their particular registered warrants should be paid. He is saying that he had funds to pay some. That is his idea.

The COURT.—You have alrealy proved by him that there were others outstanding?

Mr. RYAN.—Yes.

The COURT.—What difference does it make whether they were outstanding a year later or not?

Mr. RYAN.—Possibly it does not.

Mr. McLAUGHLIN.—If your Honor please, for the purpose of cross-examination, I think it is material to show that these warrants were not taken up at the time that this man said that they had the funds for that purpose and to the contrary nearly a year later these warrants were still outstanding as registered warrants and unpaid—not called.

The COURT.—This testimony does not go to school or road warrants? You are not questioning him in reference to the school warrants or the road warrants, are you?

(Testimony of George J. Schaefer.)

Mr. RYAN.—I am questioning him generally as to the outstanding warrants of Navajo County registered at that time.

The COURT.—You are confusing me with your question. Designate what warrants you refer to. You see, this witness has testified that there were funds to take care of all of the road and school warrants outstanding at that time.

(Witness continued as follows:) On October 4, 1924, I had funds sufficient to take care of all of the road and school warrants of Navajo County then outstanding—all of the registered warrants. I have the warrant register covering that full period from the year October 1, 1923, to October, 1924. I do not think there were other school warrants outstanding besides those held by the Holbrook Bank—outstanding registered school warrants.

Q. The books will show that, won't they?

A. Sure they will show.

Q. What?

A. They will show. Yes, there was.

Q. What? A. There was.

Q. And, on October 3, 1924, you registered school warrants, did you not, for the Bank of Winslow?

A. I did.

Q. Yes, sir. Now, if you had sufficient money in your hands to pay all of the school warrants, why did you register some more on that day?

A. Because I was buying up the oldest ones that were out and re-registering them.

(Testimony of George J. Schaefer.)

Q. Buying up the oldest ones that were out and re-registering?

A. If you want me to tell you how it happened, I will.

Q. I would like to know how you handled that situation.

A. I had an agreement with the Bank of Winslow on all of the collateral that whenever they were in—I wanted to get rid of collateral I would take it back whenever I could. I told them I would take these certain warrants and, in buying the warrants, I bought the oldest, because all of the old ones were in the hands of the Bank of Winslow and its branches at Holbrook and I bought those and registered—kept on registering. I never stopped but I had money collected during the month of September that enabled me to buy better than $12,000.00 worth of school warrants. I kept on registering but bought the old ones with the monies that the account was replenished with.

Q. Just what was your system of re-registering?

A. I guess I was wrong. I kept on registering. I bought the old registered warrants.

The COURT.—Q. You were not re-registering warrants that you had purchased?

A. No, that was a mistake of mine.

Mr. RYAN.—Q. Have you any of the warrants in your files here of the class that you say that you re-registered—purchased the old ones and re-registered the new ones—have you?

A. I haven't any warrants.

(Testimony of George J. Schaefer.)

Q. How? A. I haven't any warrants.

Q. You did not bring any with you?

A. Those warrants are not in my possession. I turned those over to the Board of Supervisors every month.

Q. Now, isn't it a fact that the Bank of Winslow, through your co-operation with the officers, that you would take a bunch of miscellaneous warrants and you would make from school funds entirely new warrants? A. I don't quite understand.

Q. Didn't you make a new warrant for a bunch of miscellaneous little warrants? A. Never.

Q. Never at all?

A. No. I wish I could. I would like that arrangement.

Q. Can you find in that bunch of warrants the warrant that goes with that particular deposit?

A. That is not a warrant. That is a voucher.

Q. Well, a voucher.

A. I would not know anything about it.

Q. A voucher at the Bank of Winslow?

A. I don't know who it is to. It is from the Bank of Winslow to the County Superintendent of Schools for payment.

Q. Now as a matter of fact, on the strength of that, there was a new warrant issued? A. Yes.

Q. Paid her a new warrant? A. By her.

Q. By her? A. Yes.

Q. And that is one of the registered warrants?

A. I don't know.

Q. It was not issued on the claim?

(Testimony of George J. Schaefer.)

A. It all depends what district it was on.

Q. Didn't that take up a number of smaller warrants? A. That is not a warrant.

Mr. RYAN.—Q. You were asked by the plaintiff's attorney to produce the receipts of papers—books that you had pertaining to this Bank of Winslow account, were you not?

A. Yes.

Q. Now, you did produce for him this paper which you have in your hand, did you not, and gave it to him to-day in court?

A. Well, I am not sure whether that was in it but I think it was. Everything I had.

Q. Everything you had. Now, that is a communication that you received pertaining to some of these warrants? A. Yes.

Q. Of date October 10, 1923? A. It is.

Q. And some of the warrants pertain to one of the lists of warrants that the plaintiff is presenting and you testified about, is it not?

The COURT.—Speak up loud.

A. That was held at the time of closing.

Mr. RYAN.—I will offer this. Mark for identification.

The COURT.—Defendant's exhibit— What is it?

The CLERK—B.

The COURT.—For identification.

Mr. RYAN.—It should be C, I think.

The CLERK.—No.

(Testimony of George J. Schaefer.)

Mr. RYAN.—We had a letter and a copy of a letter and this is the original.

The CLERK.—That was one item. Defendant's Exhibit "A." Defendant's Exhibit "B," this is.

Mr. RYAN.—Q. This yellow paper attached, is that your copy of the—not communication—isn't that a copy of your letter in answer to the letter of October 10, 1923?

A. Let me read it. Yes, it is.

Mr. RYAN.—I will now offer this.

The CLERK.—Do you want that as B and C is what I am trying to find out.

The COURT.—Submit it to counsel.

The CLERK.—Are these for identification, B and C, so as to keep the record straight?

The COURT.—Two of them, B and C.

Mr. RYAN.—Just having that marked for identification so that I could submit them to argument.

Mr. WILSON.—That is all right. Go ahead.

Mr. RYAN.—No objections?

Mr. WILSON.—No objections.

The COURT.—They may be admitted in evidence.

Mr. RYAN.—May I read it into the record at this time, if your Honor please? "Arizona State Bank, Winslow, Arizona, October 10, 1923, George J. Schaever, County Treasurer, Holbrook, Arizona. Dear George. As per our agreement a few days ago, I am enclosing herewith registered warrants to the amount of $2,583.37 to be held by you as security on an additional deposit of county funds.

(Testimony of George J. Schaefer.)

Hoping you will find the same correct, I am, very respectfully, Charles, F. Oare, Cashier." And your reply to that: "Charles F. Oare, Cashier, Arizona State Bank, Winslow, Arizona. Dear Charlie: This is to acknowledge receipt of $2,583.37 in registered County warrants mailed to this office as security on County deposits in your bank. Hoping I may see my way clear to sweeten my deposit in the next few days, I am, yours truly, George J. Schaefer." Now, what, Mr. Schaefer, was the conversation of a few days before that you referred to with respect to making additional deposits?

A. As far as I remember, I had went up there—happened to be in Winslow and I trold him he was short of collateral and to please mail me what registered warrants he had.

Q. Isn't it a fact that this extra security was to secure the additional deposits which he was making?

A. No, sir.

Q. Why does he so say then and you acknowledge it?

A. I didn't acknowledge that. Not in that manner.

* * * *

Q. They amounted to about $14,000.00 of value, did they not? A. Yes, sir.

Q. Now, those were Town of Winslow improvement bonds. Those are the same bonds that appear in one of these—this other exhibit listing?

A. I feel sure that that is what they were. Right previous to that they had some surety which was

(Testimony of George J. Schaefer.)

cancelled and replaced and I am not sure about the list.

Q. Now, on October 9, 1923, what was your deposit with the Arizona State Bank?

* * * *

A. (Witness refers to records.) The report sheet of my record has been transferred for that month. It is not in this ledger. It is at home.

Mr. RYAN.—Q. So you haven't any record here of that amount?

A. I would say approximately $17,000.00, because I know the account that I was running.

Q. Now, on October 10, 1923, was there any depositary bond given by the Arizona State Bank of Winslow to the County of Navajo that you know of?

A. Not given of that date. I had one previous to that date.

Q. For how much? A. $10,000.00.

Q. That was to the Arizona State Bank?

A. That was.

Q. Now, can you turn to your books—What day do you say that the Arizona State Bank account was transferred on your books to the Bank of Winslow?

A. It was transferred from the old name on September 1, that is, on my records, and some time during August, on the bankrupts.

Q. Of what year? A. 1924.

Q. August, 1924. Can you show what the amount of your deposit with the Arizona State Bank was at that same date, August, 1924?

Mr. WILSON.—That is in the record, Mr. Ryan.

(Testimony of George J. Schaefer.)

Mr. RYAN.—What?

A. $17,927.19. That balance was like that for about three months.

Q. The Arizona State Bank, seventeen thousand?

A. Yes.

Q. Could that amount—

Mr. WILSON.—It is already in, Mr. Ryan.

Mr. RYAN.—Q. Now, Mr. Schaefer, will you turn to your account with the Bank of Winslow, this insolvent bank of which Mr. Hammons is Superintendent of Banks in charge, and show what the amount of your deposit in that bank was at that time?

A. $51,209.75. That is both active and inactive.

Q. That was at the time on the same date that you transferred the account of the Arizona State Bank?

A. No. I thought you meant deposits.

Q. No, I meant at this date in August when you transferred.

A. On what date? September 1, transferred? I have the Holbrook branch $8,642.25 and then the Winslow branch $14,876.09 and $15,000.00 in C. D.'s at Holbrook.

Q. $15,000.00 in C. D.'s at Holbrook. I think you testified that this same $14,000.00 approximately, of Winslow—Town of Winslow improvement bonds and some of these same registered warrants that were turned over by the Arizona State Bank are still in existence, that is, you still have or still had?

A. No, I liquidated all of those.

Q. You liquidated all of these? A. Yes.

(Testimony of George J. Schaefer.)

Q. When?

A. After the closing of the bank. That is part of the $7,300.00.

Q. That is part of the $7,300.00 that you liquidated? A. Yes.

Q. Now, at the time that you held these registered warrants of the Arizona State Bank and these $14,000.00 of improvement bonds of the Town of Winslow to secure the old account of sixteen or seventeen thousand dollars you had depositary bonds of the Maryland Casualty Company to an amount of $40,000.00, did you?

A. That is, in another bank at that time.

Q. What?

A. I am speaking about the defunct bank now, the Bank of Winslow.

Mr. WILSON.—On what date?

Mr. RYAN—On the same date that he says that he transferred—

A. Yes, I had the $40,000.00 that were set forth there.

Q. What?

A. With the town improvement bonds, the $40,000.00 and the warrants.

Q. You had $40,000.00 of depositary bonds?

A. Yes.

Q. In favor of the County of Navajo?

A. Yes.

Q. To secure its deposit with the different branches of the Bank of Winslow, did you not, at that time?

(Testimony of George J. Schaefer.)

A. Yes.

Q. And that situation has continued with respect to that—those depositary bonds and the improvements bonds down to the time this bank closed in October, 1924? A. I did.

Q. No new arrangement made about it?

A. None.

Cross-examination by Mr. RYAN.

I had County funds of Navajo County on the 4th of October, 1924, in two Winslow banks, one Holbrook bank and six New York banks. The funds to pay school warrants, salary warrants and road warrants were in no particular bank. I would draw on most any of them. The account was general. I had the money somewhere in my custody, provided the banks paid the checks, with which to pay certain warrants. It is my custom to draw a check on a certain bank for the amount of the warrant or warrants that I take up.

Q. And the checks necessary to have taken up these school warrants and road warrants and expense warrants and salary warrants that is in controversy here, you know you had funds somewhere but you don't know in what particular bank you had it, do you?

A. I know where I would have drawn the check—on what bank.

Q. You know where you would have drawn it?

A. If I had—those bonds—warrants from the Bank of Winslow, I would have drew on the Bank

(Testimony of George J. Schaefer.)

of Winslow at the same time and *and* automatically decreasing the deposit along with the collateral.

Q. But you did not draw the check?

A. No, I did not.

Q. The warrants were not presented to you so that you would draw a check from the 1st to the 4th of October, were they? A. No.

Q. And other warrants that were presented, you registered? A. I did.

Q. And isn't it a fact and don't your books so show that the authority of the Board of Supervisors to check up these registered warrants was given later in October along about the 31st of October or the 1st of November?

A. Well, I don't know about the 1st.

The COURT.—1924?

Mr. RYAN.—Of '24. The week or ten days and thirty days after the failure. Well, the Board of Supervisors did set in October with respect to using—transferring funds to take up the expense warrants, did they not? Look on your register there at the expense and salary warrants?

(Witness refers to his books.)

Mr. RYAN.—I withdraw the question, then, for further—

Q. Now, Mr. Schaefer, will you point out to the Court any record that you have showing that you had available in the Bank of Winslow on the 3d day of October enough to pay any particular school warrants?

(Testimony of George J. Schaefer.)

Mr. WILSON.—Objected to as reiteration, because the witness has testified time and again that he did have the money there and that he would have paid the warrants.

The COURT.—The objection is overruled, and he may point it out.

Mr. WILSON.—Exception.

Mr. RYAN.—Assuming that he was testifying from what was in his books.

A. All right, you want me to show you?

Q. I want you to point out the items and show where you had any—in the general school fund, for instance—take the general school warrant fund.

A. All right, sir, I had available in the general fund outside of the districts at that time a credit of $10,079.20.

Q. That was to the general school fund. How much of that $10,000.00 was in the Bank of Winslow? Is there anything on the books to show it?

A. No, the records don't read that way. It is a general account.

The COURT.—Q. You mean a general deposit?

A. To make it plain, I would have drawn on the Bank of Winslow for every warrant I would have purchased at that time.

Mr. RYAN.—Q. You would have drawn then, under your practice, whether the fund in the Bank of Winslow was there available for the purpose of paying school warrants or not, wouldn't you?

Mr. WILSON.—If the Court please, I am going to object to this line of testimony, because counsel knows that these accounts are general; that they are not divided in the banks; that all of the funds are merged into one fund as far as the bank account is concerned under a general deposit.

The COURT.—Under a general deposit?

Mr. WILSON.—And that is the way the statute contemplates it and counsel knows it.

The COURT.—The only thing that the Court is concerned in was the amount of deposits in the Bank of Winslow at that time.

Mr. RYAN.—I am trying to urge to the Court that it is immaterial how much money there might have been in the Bank of Winslow to the credit of Navajo County. That credit is not subject to payment of any school warrant, or any expense warrant or any salary warrant and it would be improper for the Treasurer to draw any one of those classes of warrants against that fund there unless his account as he keeps it with those separate funds shows that there is available distinct funds in the general fund.

The COURT.—Do you contend that he should have had a deposit in the Bank of Winslow of certain moneys to the credit of the school fund, certain moneys to the credit of the road fund—

Mr. RYAN.—Not necessarily but on his own books somewhere. It would be improper for him to draw funds against the Bank of Winslow unless he had school funds—showed by his books to

(Testimony of George J. Schaefer.)

be a credit of that deposit there and it is immaterial where else it was. He could take it from somewhere else and put it there if he wanted to draw the the checks, if he had it available somewhere else.

Mr. PATTEE.—If he had a hundred thousand dollars in three different banks, he could draw on any one of them for any fund.

The COURT.—If he had school money available at the same time?

Mr. PATTEE.—*I* don't make any difference.

(Argument continued.)

The COURT.—The objection is on the ground it was immaterial, is it not?

Mr. WILSON—Yes, sir.

The COURT.—The objection will be overruled.

(Last question read by the Reporter.)

A. No.

(After objections to question of cross-examination were overruled, the witness proceeded as follows:)

Mr. RYAN.—Q. Now, retrace your steps, Mr. Schaefer. You said that you had somewhere in some bank $10,000.00 available for payment of school funds?

A. I did.

Q. School warrants? A. I did.

Q. Have you anything in your books to show that a single dollar of that $10,000.00 was on deposit—actually on deposit in the Bank of Winslow?

(Testimony of George J. Schaefer.)

A. None other than it was in one of the banks some place.

Q. Now, I will ask you if you did, in the course of your transactions with the Bank of Winslow, so keep your books that the amount received and paid out on account of separate funds—each specific appropriations were exhibited in separate and distinct accounts?

A. I don't get the question at all.

Q. What?

A. I don't get that question. No.

(Last question read by the Reporter and answered "No.")

Mr. PATTEE.—I don't know what that question means.

Mr. RYAN.—Q. You did not?

The COURT.—Well, the witness seems to understand it.

Mr. PATTEE.—Well, possible he does, but in view of the statute which he puts everything in the one fund and that fund is divided between a dozen different banks—

The COURT.—It seems to me that what you are trying to get at is this—

Mr. PATTEE.—What difference does it make whether he draws it on that one bank or—

The COURT.—School money is raised by taxation, isn't it, and when money is paid to the County Treasurer, it is apportioned to the school fund, isn't it?

(Testimony of George J. Schaefer.)

Mr. PATTEE.—Yes, but it all goes into the common fund in the bank, under the statute.

The COURT.—Yes, but the apportionment is the thing; the fact that the money is received and the fact that it was apportioned to any particular fund and that the money has not been paid out. It is still available. It doesn't make any difference whether it is deposited, I take it—

Mr. RYAN.—If your Honor please, in answer to general questions of counsel on the direct examination of the witness, he made certain statements that there was certain funds available. He has stated or supposed to state facts from the condition of his books—that he knows that this, that—this fund and that fund and the other. He says so from memory but, in answer to my question, which is based upon the language of the statutory duties of that treasurer, he has answered that he don't know and he did not keep the books so he could tell whether there was funds available for one particular fund or for another.

Mr. WILSON—I don't recall any such testimony.

A. No.

Mr. BARTH.—May I be permitted to ask him a question? Will counsel permit me to ask a question?

Q. Do you have your books showing the balance on the road fund on the 3d day of October, 1924?

A. I do.

Q. Will you read it, please?

(Testimony of George J. Schaefer.)

A. $3,374.93.

Q. Do you know how many—the approximate amount of outstanding road warrants there was at that time?

A. Not over $2,200.00.

Mr. WILSON.—Q. What was the balance in your salary fund?

A. $5,354.41.

Mr. BARTH.—Q. What was the outstanding amount—approximately outstanding against the salary fund?

A. It was better than six thousand dollars.

Q. What was the balance in the expense fund or the deficit?

A. That was quite large. $47,000.00 to the bad.

Q. To the bad?

The COURT.—How can you get at that school fund?

Mr. BARTH.—I didn't quite get your Honor's question.

The COURT.—The school fund. You touched all except the school fund.

Mr. BARTH.—There was a deficit of $47,000.00.

A. In the expense fund.

Q. What was there in the general school fund?

A. $10,079.20.

Q. What sort of warrants are drawn against the general school fund?

A. Just those of the County Superintendent's office expenses, I think, but this $10,000.00 you

(Testimony of George J. Schaefer.)

understand, is apportioned out of this into the districts by the School Superintendent.

Q. And you don't apportion that part of it?

A. No, only on her order.

(Further cross-examination of the witness is continued by Mr. Isaac Barth.)

The witness stated: There are special school funds of 25 common school districts and three high school districts, and each district has a separate account.

Q. Will you kindly give us the aggregate amount of the money due to the credit of these school funds?

The COURT.—How long will that take you?

A. Aggregate? He wants an approximate amount.

Mr. BARTH.—Well, of course, a few hundred dollars—

Mr. WILSON.—I object to the materiality.

The COURT.—Do you want to follow these warrants down and find out the funds they were checked against?

Mr. BARTH.—No, sir, but I do want to do this: I want to know if the aggregate of the school fund, the expense fund, the road fund and the salary fund—how it corresponds with the bank balance and the outstanding—

A. Why don't you hire an accountant?

Mr. WILSON.—All that we have attempted to prove and we have proven it is that the bank had

(Testimony of George J. Schaefer.)
enough money to take care of all of these warrants.

Mr. BARTH.—Yes, but if there was money in the bank—

(The witness continues:) I have a sinking fund. They are on all the county bond issues of which there are approximately 12.

Q. Will you give us the amount—the aggregate amount that should be in the twelve sinking funds?

Mr. PATTEE.—I think I will object to that as immaterial and not proper cross-examination.

The COURT.—I don't know how that is material.

Mr. BARTH.—It is material, if your Honor please, in this effect. Assuming that he had $20,000.00 in the bank and if he should have $30,000.00 to the credit of the sinking fund, then he didn't have money enough with which he could legally pay those amounts.

Mr. PATTEE.—May I suggest to Mr. Barth that we have stipulated that $15,000.00 was in the inactive fund. The rest was in the active fund subject to check.

(Argument continued.)

The COURT.—Objection is sustained.

(Further argument.)

The COURT.—I can't see that is right. The objection is sustained.

Mr. McLAUGHLIN.—We will note an exception on behalf of the defendants.

(Testimony of George J. Schaefer.)

Cross-examination Continued by Mr. RYAN.

Q. Mr. Schaefer, will you turn to your account on your books with the Bank of Winslow?

(Witness produces book.)

Q. Just read off the state of the balance of that account with the Bank of Winslow from the 1st of July up to the time the bank closed.

A. 1st of July, $14,876.09.

Q. 1st of July, 1924?

A. 1924. Pardon me. That was $21,428.69, 1st of July. 1st of August, $14,876.09. 1st of September, the same.

The COURT.—What item is this?

Mr. RYAN.—The item of the actual balance of deposits in the Bank of Winslow beginning July 1, 1924—the state of account as shown by his books.

A. And October 1, $26,662.85.

Q. What deposits, if any, were made between the 1st of September and the 4th of October?

A. There was a transfer of the Arizona State account of $17,927.19 and a deposit of $55.23 during September and another one of $47.95 in October.

The COURT.—Q. There was on deposit at the time the bank closed its doors—

A. $26,662.85.

Mr. RYAN.—Q. Now, you referred to the school fund yesterday—general school fund yesterday, Mr. Schaefer. Turn to that item again please. You said that on the 1st of—on the 30th of September

(Testimony of George J. Schaefer.)
there was a balance of $10,079.22. Now, it is a fact, is it not, that that general school fund—that is a bookkeeping item, is it not?

A. Yes, sir.

Q. Showing receipts—general aggregate. It is a fact that that fund is actually distributed to how many districts? A. Twenty-five.

Q. And you distributed that on the order—

A. They would not necessarily go to twenty-five. It might go to two—which ever ones have that money coming. That is up to the superintendent of schools.

Q. So that, as a matter of fact, there is, except as a matter of bookkeeping, there is practically no general school fund in the county?

A. No, because it is apportioned away from there into others.

Q. So that that is a matter showing the aggregate receipts prior to apportionment?

A. That is the original source, though.

(Witness continues:) My expense account showed an overdraftof some forty odd thousand dollars during this same period. We used the monies of the redemption fund to let the expense account get into that shape. That was at another period that I told you I stated to the Board of Supervisors the 1st of July or about that time that we used some $32,000.00 of redemption fund to carry these other—

Q. Well, how much of the redemption fund had you used as of October 1?

(Testimony of George J. Schaefer.)

Mr. WILSON.—If the Court please, I am going to now object to this line of questioning, on the ground that it is all immaterial as to what happened to the expense fund—how they were taking care of it.

The COURT.—I think the expense fund is out of this case.

Mr. WILSON.—In that connection, I might state, your Honor, that we practically admit no offset in regards to that, because there was no money in the fund. It was in the red.

Mr. RYAN.—May I suggest something to your Honor? Now, it appears that all of the money of this county, so far as any bank was concerned, was put there in one account. It was all treated on the books as a general pocketbook.

The COURT.—Yes, that appears very clearly in the evidence.

Mr. RYAN.—Now, there is some evidence to show not that it was done but that it was intended to be done at some time to pay certain school warrants.

The COURT.—Q. Where do they get the money for the road fund?

Mr. WILSON.—Special levy for that.

A. Special levy.

The COURT.—Q. Any transfer from the sinking fund to the road fund to cover these warrants?

A. All of these funds—the monies in the general fund—school fund and the road fund was transferred from what they call a state and county col-

(Testimony of George J. Schaefer.)

lection fund. They are all collected by the state and county taxes and the apportionment made from there, as directed, by the Board of Supervisors, according to the levy of the budget.

Q. But the question is, did you take from the sinking fund any cash and transfer it to the road fund for the purpose of taking up these warrants?

A. Only to the expense fund.

Q. Never to the road fund or the school fund?

A. Never.

The COURT.—Is that what you are after?

Mr. RYAN.—Well, that is— Q. But so far as any account that you had at any bank, if you drew a check on that bank for expense account, if there was money there, it was paid wasn't it?

A. I did not draw on any bank for expense accounts. The boards designates the accounts. I would have a pocket full of money or two pocket fulls and I might draw from one or the other. It is all one thing. Yes, the Clerk of the Board of Supervisors draws warrants on the various funds according to the county appropriations, and these warrants finally come to me; and my mode of paying is to draw check on some deposit in some bank, or out of my cash drawer, if it is all cash. The amount I carried in my vault varied a whole lot. During the months of October and November, April and May, I carry two or three thousand in cash. If I drew a check on the expense to take up an expense warrant and drew it to the Bank of Winslow, they paid that check out of any funds

(Testimony of George J. Schaefer.)

to the credit of, to my credit. And if I drew a warrant on the road fund, and I drew that on the Bank of Winslow or any other bank that showed a balance in my general deposit, that check was paid. And the same was true with all other checks that I drew to take up any school fund warrants and salary fund warrants.

Q. And the result of it all was that when you finally figured up you had overdrawn your expense account some forty thousand dollars and you were how much shy on your redemption fund?

Mr. WILSON.—Objected to as calling for a conclusion.

The COURT.—Objection is sustained.

Mr. RYAN.—Very well. An exception, if your Honor please.

(The witness continues:) I had collections that went to the credit of the general school fund that you have been talking about from collection of taxes about the 1st of Sept. and the 1st of Oct.—during September and all of the months. I have a record to show what became of the proceeds of that collection. It went to the various districts—that is, the money went to some one bank. I don't know which one. Any of them. It did not make any difference.

Q. What other banks besides the Bank of Winslow, and its branches were you doing business with during the month of September?

Mr. WILSON.—If the Court pleases, I am going

to object to that line, because it is immaterial and it has already been covered by this witness.

The COURT.—I think it is immaterial. You seem to take the position that you must follow this identical money as distinguished from other general deposits. I don't get the idea.

Mr. RYAN.—If your Honor pleases, the idea of that is simply following the law of the State of Arizona, as I understand it. Your Honor and I may differ about that but every dollar that is raised for county purposes is raised with respect to a budget. It is appropriated to certain purposes. That is tax money. It must not be used for any other purpose.

The COURT.—Well, we will assume that they raised money for the schools and for roads and for expenses for various other funds and it is all placed in these funds and carried on the books in separate funds but all of the funds are deposited in the bank—

Mr. RYAN.—In some bank.

The COURT.— —without any designation as to which fund. The bank has no knowledge of which fund it is but they have a large fund of money there. Now, his books will show that there is so much money to the credit of a certain fund. What difference does it make whether it is *in* bank or two banks or four banks?

Mr. RYAN.—I will suggest this to your Honor in support of my question. Would your Honor believe that the Bank of Winslow itself on the 3rd

of October could have taken such warrants as it had in its vaults and looked on its ledger and charged those warrants to that account without the authority to so do issuing from the county treasurer?

Mr. WILSON.—If the Court pleases, that is not our contention and counsel—

Mr. RYAN.—It is my contention that you could not do it.

Mr. WILSON.—When the bank closed, then the rights of the parties under the law became established and from the date the bank closed we are asserting and submitting to your Honor that a certain status existed, and it is upon that status that our rights depend.

Mr. RYAN.—If Mr. Wilson would let me get through.

Mr. WILSON.—I am trying to indicate, Mr. Ryan, that this—

Mr. RYAN.—I am outlining the position that I am taking with respect to this line of proof. Now, if the Bank of Winslow could not, as an insolvent bank at any time have taken a bunch of warrants—this particular bunch of warrants that were in their possession at various times and various amounts and looked at the account of George J. Schaefer, Treasurer of Navajo County, and say with respect to those warrants when he sent down a check there for $10,000.00 they did not want to pay—"Why, Mr. Schaefer, we can't do that. We are going to charge your account off with these registered war-

rants that we hold against Navajo County." Now, unless they could do that, the surety is in no better position than the principal would be with respect to set off. That is my position and that is why I am trying to show—that is why I am trying to show that there was no—there was not sufficient funds to take care of anywhere—to take care of the outstanding obligations. The paid warrants, to be sure. They have paid school warrants but they borrowed on other funds to do it to leave anything in that bank. I may be wrong, but that is my position, your Honor.

Mr. BARTH.—May it please the Court, insofar as Apache County is concerned, we think that this evidence is material and we would like to see it go on the record, because the Court has evidently considered it material that at the time the bank closed the Treasurer of Navajo County had money enough on hand to pay the outstanding warrants if they had been presented.

(Argument continued.)

The COURT.—Now, what is the question before the Court?

(Question read by the reporter.)

The COURT.—What is the objection?

Mr. WILSON.—I objected on the ground that it is immaterial.

The COURT.—Objection is sustained.

Mr. BARTH.—As I was going to say, my argument was not directed to that phase of it.

The COURT.—The objection is sustained. Proceed.

(Testimony of George J. Schaefer.)

Mr. RYAN.—Take an exception on behalf of all the original defendants, if the Court please.

Mr. BARTH.—May I ask him one question and then be through?

Mr. McLAUGHLIN.—Certainly.

Mr. BARTH.—Q. What do your books show as to the amount of dollars—aggregate amount of dollars that there should have been to the credit of the bonds sinking fund?

Mr. WILSON.—I object to that as immaterial, if the Court pleases.

The COURT.—The objection is sustained.

Mr. BARTH.—Note our exception.

Mr. RYAN.—Note an exception on the part of all of the original defendants in the case.

Cross-examination.

(By Mr. McLAUGHLIN.)

(Witness continues:) I am acquainted with Mr. Kenneth Myers, who was at one time manager of the Bank of Winslow at Holbrook, and Mr. Myers inquired of me, before the Bank of Winslow closed, as to what time the warrants held by the Bank of Winslow were to be paid. That was some time during the three or four months he was there, and was at my office in Holbrook. I think it was during July, 1924. This memorandum is in the handwriting of Kenneth Myers. I don't know that the memorandum was made at that time. I think we talked over the phone regarding this. What I remember telling him was just like this reads, that

(Testimony of George J. Schaefer.)

all school warrants should be paid in November; that all salary warrants paid about January 1. I did not anticipate the good luck that I had at that time when I spoke. I was ready before that. The yellow road fund; that is the color of the warrant. He put the color of that. Paid about January 1. Should be paid, and the pink expense funds, approximately May, 1925.

Mr. McLAUGHLIN.—Q. And that is the last conversation you had with Mr. Myers, with reference to that?

A. I don't think so. There might have been more.

Mr. WILSON.—If the Court please, I am going to move to strike that last line of testimony, now that it has come out.

The COURT.—On what ground?

Mr. WILSON.—As immaterial, as well as being irrelevant.

The COURT.—Motion is granted and the evidence is stricken and an exception.

Mr. McLAUGHLIN.—We will note an exception, your Honor. What was the ground of the counsel's motion?

The COURT.—Immaterial.

Mr. McLAUGHLIN.—We would state for the purpose of the record our position in this matter. It is proper cross-examination for the purpose of showing that the funds were not available for the payment of these warrants at the time testified to in direct examination.

(Testimony of George J. Schaefer.)

The COURT.—He has not testified that they were available.

Mr. McLAUGHLIN.—Yes, sir, and this is cross-examination, your Honor. This is cross-examination which shows that he made statements contradicting that and the very purpose of cross-examination is to contradict what was brought out in direct examination.

(Argument continued.)

The COURT.—Well, the ruling may stand.

Mr. McLAUGHLIN.—Is our exception noted? Exception on behalf of all the defendants.

(Witness continues:) School warrants 151, 7 and 8, dated in September and October, 1922, included in Plaintiff's Exhibit 155, were liquidated after the failure by giving credit upon the bank account to the Bank of Winslow.

Mr. McLAUGHLIN.—Q. Now, this School District No. 1 warrant is in the sum of $1,015.06, warrant No. 151? A. Yes.

Q. What school district was that drawn upon?

A. No. 1 of Winslow.

Q. For what purpose was it drawn—in payment of what?

A. I don't know offhand. I would have to see the vouchers.

Q. Well, as a matter of fact, was it not drawn in payment of many—of warrants that were consolidated to arrive at this sum? In other words, no school teacher would receive that much money as a salary warrant for one month?

(Testimony of George J. Schaefer.)

A. I don't believe so.

Mr. McLAUGHLIN.—Q. In order to arrive at that figure, it would be necessary to consolidate several warrants?

A. Yes.

Q. And that is evidently—

A. Unless it was for supplies or coal shipment or anything else for the—

Q. It was your practice to consolidate several warrants into one warrant?

A. No, I never issued them.

Q. You never issued them?

A. No, they were issued by the County Superintendent of Schools.

Q. Do you know whether or not it was the practice of the County Superintendent of Schools to consolidate them? A. It was.

Q. After they were brought to you for registration, was the form of the warrant at any time changed as to payee? A. Never.

Q. After they were registered by you, were they ever returned to the County Superintendent of Schools and by her changed? A. Never.

Q. As to the payee or the amount and then re-registered by you?

A. No. I have no knowledge of it, if it happened.

Q. Now, when you spoke yesterday of re-registering these warrants Mr. Schaefer, what did you refer to?

(Testimony of George J. Schaefer.)

The COURT.—He changed his testimony on that.

Mr. McLAUGHLIN.—I didn't mean to—

The COURT.—The record does not show that he re-registered any warrants.

Mr. PATTEE.—He used the term as applied to the registration of new warrants.

The COURT.—New warrants was his testimony.

Mr. McLAUGHLIN.—That is all for us.

The COURT.—Any further cross-examination?

Mr. BARTH.—Q. You testified yesterday, I believe, that there was money available for the payment of these outstanding county warrants on the day the Bank of Winslow failed?

A. Certain warrants.

Q. Was that money—was the amount of that money—withdraw that and I will frame it differently. Could you have paid it out of the money in your hands to the credit of those particular districts or funds? A. To the credit of the different—

Q. Sir?

A. I don't quite get the—to the credit of the particular districts—out of my hands to their credit—it would be to their debit.

Q. Well, at the time that you say this money was available, as I understand it, you had a certain amount of money in the bank, if these warrants had been presented to you for payment. Did you mean by that statement that you could have taken this money that you had in this fund and paid the warrants? A. Yes.

(Testimony of George J. Schaefer.)

Q. Did you mean also that all of those funds that you mentioned, not counting the exceptions that you made, had that much to their credit at the time?

A. I did.

The COURT.—That is what he testified to yesterday and he testified from the books to that effect, Mr. Barth.

Mr. BARTH.—That is all.

Mr. WILSON.—Q. Now, Mr. Schaefer, will you state—when you answered a question about the merging of these claims in one warrant, I understood you to say that they merged warrants and issued one. Did I misunderstand you or did you mean—

A. I meant to say they merged vouchers into one.

Q. Vouchers and claims? A. Yes.

Q. I wanted to get that clarified. Mr. Schaefer, were warrants drawn for manual training school expenses chargeable against the general school fund?

Mr. RYAN.—I object to that as a question of law.

Mr. WILSON.—No, I am asking him if he charged them against the general school fund.

Mr. RYAN.—I object as immaterial what he did. It is a question of law as to where those should be charged.

Mr. WILSON.—He is supposed to know the law, if the Court please. He is an official administering the law.

The COURT.—Well, he may answer how they were charged. Objection overruled.

(Testimony of George J. Schaefer.)

Mr. RYAN.—Take an exception.

A. They were charged against not the general fund but they had two manual training accounts, one on what we consider School District 1 and 3 and they were charged against their common school accounts?

Mr. WILSON.—Q. Were there any other manual training school funds?

A. No, just two.

Q. And all warrants that were drawn for that purpose were drawn and paid out of the account which you kept and not general school fund?

A. That is under a district heading, yes.

Q. And, at the time the bank closed, you had sufficient money in those funds to take up any outstanding manual training school warrants?

A. I did.

The COURT.—Some of these warrants were manual training school?

Mr. WILSON.—Yes, sir, there was three of them —two or three. I think and I just wanted to make sure that they were included, that is all. Now, I want to introduce, if the Court please, Plaintiff's Exhibit 163, which I overlooked yesterday, for identification. It is a letter from Neel, vice-president of the Bank of Winslow, acknowledging receipt of Mr. Schaefer's receipt for the registered warrants in the amount of $2,839.24.

Mr. RYAN.—I will object to it, for the reason that it fails to identify any of the warrants there

referred to in the aggregate nor of the warrants involved in this case.

The COURT.—What is it?

Mr. RYAN.—It says, "This will acknowledge receipt of your letter of the 26th enclosing a receipt for registered warrants in the amount of $2,839.24, which were being held by you as a guaranty of county deposits. Receipt of the Panama Canal bond for $1,000.00 which has been held by you is also acknowledged."

Mr. WILSON.—This is a completed transaction. The other two have already been introduced.

The COURT.—Objection is overruled.

Mr. RYAN.—Take an exception.

The COURT.—Read the letter.

Mr. WILSON.—"Mr. George J. Schaefer, County Treasurer, Holbrook, Arizona. Dear Mr. Schaefer: This will acknowledge receipt of your letter of the 26th enclosing a receipt for registered warrants in the amount of $2839.24 which were being held by you as a guaranty of county deposits. Receipt of the Panama Canal bond for $1,000.00 which has been held by you is also acknowledged. Yours very truly."

The COURT.—What is the date of that?

Mr. WILSON.—The date is March 29, 1924, written on the letterhead of the Bank of Winslow, Winslow, Arizona.

The CLERK.—163, Plaintiff's.

Mr. WILSON.—That is all.

Mr. RYAN.—Are you through with the witness?

Mr. WILSON.—Yes, sir.

Mr. RYAN.—I wish to move to strike out all of the testimony of Mr. Schaefer in any way bearing upon the question of funds being available for the payment of the school warrants, road warrants and salary warrants as identified in the exhibits, for the reason that there is no showing that there was any money in the Bank of Winslow or any of its branches available at the time of the failure for the payment of any one of those warrants, the account being a general account. There has been no identification of the money in the bank or the account in that bank as having been deposited from receipts received by collections of taxes and other revenues to the school fund, the road fund, the salary fund or any other of the funds represented by the warrants which he claimed that he would have paid or could have paid but did not pay and for the further reason that it does not appear that any—at any time—it does appear that there were other warrants issued in consecutive order against these funds registered to other parties and that there has been no such call for the payment of warrants as would permit the following of the law that registered warrants be paid when funds are available in the order in which they were presented and registered to be called for payment in that order and no other.

The COURT.—The motion is denied.

Mr. RYAN.—Take an exception for all of the original defendants.

TESTIMONY OF A. T. HAMMONS, FOR PLAINTIFF.

A. T. HAMMONS, being called as a witness on behalf of the plaintiff and first duly sworn, testified as follows:

Direct Examination.

(By Mr. WILSON.)

Q. Mr. Hammons, give your name and occupation.

A. A. T. Hammons, State Superintendent of Banks.

Q. Were you such State Superintendent of Banks in May, 1924? A. I was.

Q. At that time under the laws of the State of Arizona, were all mergers, increases in capital stock and consolidations in state banks under your supervision? A. They were.

Q. At that time, in May, 1924, did the Merchants and Stock Growers Bank of Holbrook and the Arizona State Bank of Winslow merge and consolidate with the Bank of Winslow and did the Bank of Winslow increase its capital stock to $150,000.00?

Mr. McLAUGHLIN.—Now, if your Honor please, we object to that on the ground that it is not within the pleadings in this case; that it is incompetent and irrelevant as to any issue involved in this action. There is no pleading on the part of the plaintiff alleging any such consolidation in

(Testimony of A. T. Hammons.)

any manner and as far as the pleadings and the proof go it has no bearing.

Mr. PATTEE.—If the Court please, the pleadings plead ultimate facts. It pleads the state of the accounts—how they came to be that way.

The COURT.—The objection is overruled.

Mr. McLAUGHLIN.—Note our exception on behalf of all defendants.

A. Now, I would like to have that question stated to me.

The COURT.—There are two questions—possible three involved in that question that is propounded.

(Question read.)

A. The Merchants and Stock Growers Bank of Holbrook and the Arizona State Bank of Winslow did not merge.

Mr. WILSON.—Q. They assigned and conveyed to the Bank of Winslow all of their assets, did they not?

A. No.

Q. Subject to certain guaranties on the part of the Arizona State Bank and the Merchants and Stock Growers Bank and their stockholders?

A. They only assigned certain assets and assumed certain liabilities.

Q. As a matter of fact, Mr. Hammons, you have in your possession, as the custodian of such records, an assignment of the Merchants and Stock Growers Bank by the President and attested by the Secretary assigning, transferring and conveying the

(Testimony of A. T. Hammons.)

assets of that bank to the Bank of Winslow, haven't you?

A. Certain assets, yes. Not all of them. Not all of the assets.

Q. Have you that assignment?

A. I have it in my office somewhere.

Mr. WILSON.—I will ask the witness to produce it this afternoon at 2:00 o'clock.

Mr. McLAUGHLIN.—If the counsel please, I believe that he said that that assignment is in our office at Holbrook.

Mr. WILSON.—It was made in triplicate.

Mr. McLAUGHLIN.—Well, Mr. Hammons' copy is in our office, I think.

The COURT.—The main thing you want to prove is when was that assignment of these particular accounts and warrants and bonds transferred to the Bank of Winslow. If it is a fact, can you stipulate it?

Mr. WILSON.—It is a fact, of course. I am willing to agree to it rather than take up the time of producing those records.

The COURT.—Do you know it to be a fact?

Mr. SAPP.—Mr. Hammons has answered it correctly.

Mr. McLAUGHLIN.—Mr. Hammons' testimony is correct as to what he has stated.

The COURT.—You have seen the assignment, haven't you?

Mr. McLAUGHLIN.—Yes, I have seen the assignment.

(Testimony of A. T. Hammons.)

The COURT.—You have examined it and you know whether these accounts and these bonds and *thses* warrants passed to the Bank of Winslow.

Mr. McLAUGHLIN.—No, they are not covered in that assignment, your Honor.

Mr. WILSON.—By exception, they are.

Mr. McLAUGHLIN.—Well, the assignment, if you have a copy of it, speaks for itself.

Mr. WILSON.—Isn't that true, Mr. McLaughlin, there are some exceptions? The rest of it all goes over?

A. If you would let me answer—

Mr. McLAUGHLIN.—Mr. Hammons can state the details on that.

A. I will state this, your Honor, that there was certain assets in both of those banks that the Superintendent of Banks would not allow to go into the—intermingle with the assets of the Bank of Winslow, because, to my mind, they were worthless.

Mr. WILSON.—Q. That would not include warrants?

A. No, it would not.

Q. It would not include town improvement bonds? A. No.

Q. And they went over, if there were any, to the Bank of Winslow? A. Yes.

Mr. WILSON.—That is all.

The COURT.—Q. What was your answer?

A. They did.

(Testimony was thereupon introduced having reference to warrants of Apache County, which are

not involved in this matter, so far as the appellants are concerned; and upon the conclusion of the testimony of plaintiff, the following proceedings were had:)

Mr. McLAUGHLIN.—Is that the plaintiff's entire case?

Mr. WILSON.—That is the plaintiff's entire case.

Mr. McLAUGHLIN.—At this time, your Honor, the defendants Hammons and Dodson would move the Court for a dismissal of the action, having particular reference to the items referred to as the expense account warrants, on the ground and for the reason that these warrants—as to these warrants there is no evidence which discloses any right of offset. Now, in argument on that, I would call the Court's attention to the fact that the evidence of the plaintiff clearly discloses that there was no funds available for the payment of these warrants and for that reason we believe that the case as to the expense account warrants should be dismissed, with the exception of that part of the pleading which asks for the return of warrants from Apache County.

The COURT.—You all agree to that, do you not?

Mr. WILSON.—I think the objection is well taken, if your Honor please.

(After argument of counsel with reference to Apache County warrants, not concerned in this appeal by these appellants, the following proceedings were had:)

Mr. McLAUGHLIN.—If your Honor will pardon me, the disposition of the original motion which I made, that motion was granted, as I understand?

Mr. STOCKTON.—What was that motion?

Mr. McLAUGHLIN.—My motion was with reference to the expense account warrants; that the action be dismissed exclusive of the Apache County warrants.

The COURT.—No, that motion is not granted.

Mr. McLAUGHLIN.—That was the motion which Mr. Wilson agreed, as far as his client is concerned, that it was correct.

Mr. WILSON.—Now, if the Court please, I would like to correct counsel. I said that we would admit it to the extent that we were not interested in claiming an offset for a fund which did not show any money against it in the Bank of Winslow on October 4, 1924, so that that would be settled, but that is far as we go.

Mr. McLAUGHLIN.—Except as to the Apache County Warrants—you said that the—

Mr. PATTEE.—There would not be any warrant for entering a judgment of any kind but that admission was made for the purpose of relieving the counsel and the court from the necessity of hearing any evidence.

Mr. WILSON.—That is the point.

(Argument between counsel.)

Mr. McLAUGHLIN.—The defendants Hammons and Dodson at this time move the Court, and I believe this motion is concurred in by the other de-

fendants, Mr. Wilson, that the action be dismissed as to the items of warrants which are shown by the evidence to have been school warrants, on the ground and for the reason that it appears from the evidence and from the law that school bonds are held by the county as a trustee; that they are not subject to any offset in favor of the county, it further appearing that the warrants are not issued by the county but are issued by the County Superintendent of schools on particular funds; that for this reason there could be no offset of any such funds allowed in this action, this motion to dismiss as to the school funds, of course, not applying to the school fund warrants of Navajo County, which are on deposit with the County Treasurer of Apache County.

The COURT.—Merely to the warrants?

Mr. McLAUGHLIN.—To all the warrants, yes.

The COURT.—Well, that is a question that I am not advised on as to whether or not it is subject to offset. Is there any statute?

Mr. PATTEE.—These motions are wholly unnecessary except as they may serve to call the court's attention to the attitude of counsel. They are matters of argument when the case is closed.

(Argument continued.)

(After motions made by Mr. Stockton and Mr. Barth, with which these appellants are not concerned, the following proceedings were had):

Mr. McLAUGHLIN.—Now, if your Honor please, completing our motions on behalf of the defendants,

we move the court that the action be dismissed as to all of the funds and as to all of the warrants referred to in evidence and in the pleadings and as to all of the issues in the case raised by the plaintiff except the issue of the illegal deposit of county warrants with the Treasurer of Apache County, on the ground and for the reason that the evidence as adduced here fails to disclose any right of offset, on the ground that there is no showing that at the time that the Bank of Winslow closed there existed any such relation of debtor or creditor as would justify the allowance of any offset. In other words, our objection is further that there is no showing that there was any funds of Apache County on deposit in this bank—no funds of Navajo County on deposit in this bank which had been appropriated for the purpose of paying any of these warrants and on the further ground that there is nothing in evidence to show that there was any cash whatever in the hands of the Bank of Winslow for the purpose of paying these warrants.

The COURT.—That motion is denied.

Mr. RYAN.—Just one additional, so we will have all of these funds covered more specifically. I move that the action be dismissed—plaintiff's action be dismissed by reason of all the legal objections which are raised as legal defenses in the answer of the defendant county and also for the reason that there is under the laws of the State of Arizona no distinction between expense fund warrants and salary fund warrants; that under the law salary fund is an expense, so

made by statute a part of the expense fund and it appearing distinctly in this case that there was no expense fund and that the expense fund was overdrawn to the extent of over $40,000.00 on the 4th day of October, 1924. It shows that there was no fund properly available by the Treasurer to pay any of the so-called salary warrants that have been introduced here in evidence; for the further reason that the complaint fails to allege any dereliction of duty on the part of the Treasurer in calling in warrants according to the statute and in the order in which they were registered, it appearing that there was a large number of registered warrants on all of these funds and particularly the salary fund other than those in controversy in this suit entitled to priority in payment from any funds whenever available and the compelling of an offset at this time in favor of the plaintiff would be to destroy a right of other creditors of the County of Navajo to priority of payment as funds come in—became available and were set aside by the Treasurer and a call made for the payment of those warrants—no proof of any such call—no proof of any order of the Board of Supervisors setting aside any funds to take up registered warrants and this court would undertake to direct a set-off in a case where the set-off under the laws of the state had not matured, according to the law applicable to the maturity date and the time for payment of registered warrants and the manner and order of payment. That applies not only to the road warrants. It applies to all the registered

warrants and particularly to the salary warrants on the grounds stated.

The COURT.—Motion denied.

Mr. RYAN.—Exception.

Mr. McLAUGHLIN.—I would like to take an exception to all those recent adverse rulings and I would like at this time to have an exception noted, your Honor, and we would like to have one more motion, and at this time we would like to state for the record that our previous motions have all been made without a waiver of the questions of jurisdiction which have heretofore been raised and passed upon by this court and at this time we move the court to dismiss the case on the ground and for the reason that it appears from the evidence as adduced here that the *corpus* of this estate is involved in the action entitled in the matter of the liquidation of the Bank of Winslow, Winslow, Arizona, having branch offices at Holbrook, Arizona, and St. Johns, Arizona, file No. 1865 in the Superior Court of the State of Arizona in and for the County of Navajo, the said court being a court of record, having prior to the commencement of this action acquired jurisdiction of the *corpus* of the estate and being the only court which at this time has any jurisdiction thereof. This objection is made pursuant to the objection raised heretofore in a motion to dismiss and also in our answer.

The COURT.—Motion is denied. Are there any other motions?

Mr. McLAUGHLIN.—Note an exception.

TESTIMONY OF MISS ROBERTA TANDY, FOR DEFENDANTS.

Miss ROBERTA TANDY, being called as a witness on behalf of the defendants and first duly sworn, testified as follows:

Direct Examination by Mr. McLAUGHLIN.

My name is Miss Roberta Tandy. I reside at Holbrook, Arizona, and I am the deputy clerk of the Superior Court of Navajo County. I have held that position since the first of December, 1924. In the files of the Superior Court, Navajo County, Arizona, there is a matter or proceeding or an action entitled "In the Matter of the Liquidation of the Bank of Winslow, Winslow, Arizona, having branch offices at Holbrook, Arizona, and St. Johns, Arizona." I have the files of that action.

Q. Will you ascertain from the files the date that that action was filed?

Mr. PATTEE.—If the Court please, I will object to any further testimony along the line of the pendency of any such proceeding, on the ground that the purpose of it can only be in support of the assertion that this court is without jurisdiction and for reasons that have already been discussed, and discussed very fully. There is no doubt in the world that the court has jurisdiction of the subject matter and, hence, this testimony is both incompetent and immaterial.

The COURT.—You know it is a fact, however, that this action was pending?

(Testimony of Miss Roberta Tandy.)

Mr. PATTEE.—Oh, I haven't any doubt that the statutes compel a proceeding in an action.

The COURT.—Yes, a proceeding.

Mr. PATTEE.—A proceeding but that it does not effect the jurisdiction of this court either over the person of the Superintendent of Banks or the subject matter of this particular suit.

The COURT.—That is a question that has been argued to this Court before. The objection will be overruled and the evidence may be admitted. It is a question of argument.

Mr. PATTEE.—Note our exception and we will reserve the same objection to all testimony along this line and an exception to the ruling of the court.

(The last question was read by the reporter and the witness answered: "October 14, 1924.")

(The witness continues:) That action is still pending before that court and has not been disposed of. There is no order in the files of that court empowering or authorizing the Maryland Casualty Co., to bring this action. I am the clerk that has active charge of the filing of documents, and have made an examination of the docket in the case, and I know there is no such order. I believe there is no claim filed by the Maryland Casualty Co. in that matter, and I have the complete files of that matter here with me, and there is no such claim in these files.

(There was no cross-examination of this witness.)

TESTIMONY OF J. S. DODSON, FOR DEFENDANTS.

J. S. DODSON, being called as a witness on behalf of the defendants and being first duly sworn, testified as follows:

Direct Examination by Mr. RYAN.

I was the Assistant Superintendent of Banks who took charge—took possession of the Bank of Winslow and its branches for the Superintendent of Banks, when they closed. I have in my possession a memorandum from which I can refresh my memory as to the amount of cash money that was in the Bank on the 4th day of October, 1924.

The COURT.—This applies to the 4th day of October?

Mr. RYAN.—At the time it failed, your Honor.

Mr. WILSON.—If the Court pleases, I am going to object to that as immaterial. It makes no difference how much the cash the bank had. The testimony has been that the county had so much on deposit. We claim an offset. We claim an offset against the deposit, not against the cash in the bank when it closed, the deposit constituting a contract between the county and the bank and the warrants constituting another contract between the bank and the county. It is not a question of how much cash was in that bank. We are not trying to follow a trust fund or embrace the cash that was in the bank with the trust. It is a deposit proposition and we object to this testimony as absolutely

(Testimony of J. S. Dodson.)

immaterial. It has nothing to do with our claim of offset.

The COURT.—The objection is overruled.

Mr. WILSON.—Exception.

Mr. RYAN.—You may answer, Mr. Dodson.

A. Will you read the question again please?

The COURT.—This relates to cash?

Mr. RYAN.—On hand in the banks—this insolvent bank with its two or three branches.

Mr. WILSON.—Now, if the Court please, I am going to make the further objection that no proper foundation has been laid for this question and it is, therefore, incompetent and irrelevant.

The COURT.—In what way no foundation was laid?

Mr. WILSON.—No foundation, because the books of the bank are the best evidence of what cash it had or other cash assets at the time that it closed. This witness is asked to testify concerning something which is a written record, which is the best evidence of the fact that he is asked to testify concerning.

Mr. RYAN.—The witness, your honor, has said that he was the one that took possession and I am practically asking him how much tangible cash he found in the Bank of Winslow and its various branches. That is a matter of knowledge just as—

The COURT.—Are you asking for all cash in the bank?

Mr. RYAN.—That he found in the bank.

The COURT.—Or cash to the credit—

Mr. RYAN.—I am asking for the actual cash that he found in that bank at the time—and its various branches on the 4th of October when he took possession of it.

The COURT.—That is a different question, it seems to me.

Mr. RYAN.—What?

Mr. WILSON.—I renew my objection that it is immaterial, if your Honor please. I can't see the materiality of it or the relevancy of it in any way.

(Argument continued.)

The COURT.—You are objecting on the ground that it is immaterial?

Mr. WILSON.—Yes, sir.

The COURT.—The objection is sustained.

Mr. RYAN.—Take an exception, your Honor.

Mr. McLAUGHLIN.—Exception on the part of all defendants.

Mr. BARTH.—Exception on the part of intervenor Apache County.

Mr. RYAN.—In connection with that, if your Honor please, may I make another or further offer that it is my intention or purpose to attempt to prove that at the time the bank closed its doors there was not to exceed $32,000.00 of tangible cash in all of the branches of that bank and I want to prove it by this witness either by the books or some other way. Will I be permitted to do so?

The COURT.—Well, you can offer to prove it. If an objection is made the chances are I will sustain the objection on the ground that it is immaterial.

(Testimony of J. S. Dodson.)

Mr. RYAN.—Q. Well, then, I will ask that after that—I will ask if the statement which I have made is substantially correct as to the amount of cash you found in the branches—the aggregate amount?

A. It is.

Mr. WILSON.—I will object to the question as immaterial.

The COURT.—The objection is sustained.

Mr. RYAN.—Save an exception to the ruling on that.

The COURT.—I don't think it makes any difference if there was ten cents in that bank at the time it closed its doors.

(Argument between Court and counsel.)

Mr. RYAN.—Now, the stipulation, may it please your Honor, is that there was on deposit to the credit of Navajo County so many dollars. That simply means that that fifty-one thousand some odd dollars was a credit to Navajo—the amount of the debt of the bank to Navajo $51,209.75, regardless of the point which I am now trying to show, that if on that date a demand had been made even to transfer that credit to some solvent or some other bank, I want to show and prove by this witness that at the date the bank closed its doors that if a demand had been made on that bank for $51,209.75 that bank could not have paid it.

The COURT.—I believe it is immaterial and I have so held.

Mr. McLAUGHLIN.—An exception is noted on behalf of all defendants.

(Testimony of J. S. Dodson.)

Direct Examination of Mr. Dodson by Mr. McLAUGHLIN.

After the Bank of Winslow was taken over by the Superintendent of Banks, Mr. Hammons, I remained in active charge of the Bank for some time —approximately nine months, and during that time I filed certain papers and documents in the Superior Court of Navajo County, Arizona, together with my attorneys. My actions in that matter were all under the direction of Mr. Hammons who had taken charge of the bank, and I acted pursuant to appointment received from Mr. Hammons, which appointment was duly filed with the Superior Court of Navajo County, Arizona, and I gave a bond, and at the time this suit was brought I was Special Deputy Superintendent of Banks in charge under Mr. Hammons, and had the *ssets* of the Bank of Winslow in my possession as such special deputy. I filed in the Superior Court of Navajo County, Arizona, an inventory of those as required by law. I have in my hand at this time a copy of that inventory. Among the assets of the Bank of Winslow reported in the inventory there are $7,000.00 of Winslow Improvement Bonds. These are the Winslow improvement bonds which were received from Mr. Schaefer. Among the assets I also ascertained there were several Navajo County warrants; some of them were payable to the Bank of Winslow direct and some of which were payable to various other parties.

(Testimony of J. S. Dodson.)

Direct Examination by Mr. RYAN.

(Witness continues:) After I took possession, I made an effort to collect or have paid the warrants held by me as assistant superintendent of banks. Shortly after I took charge of the bank—The Bank owed something like one hundred sixty thousand, a hundred thousand or one hundred sixteen thousand to the First of Albuquerque, which I paid. There was approximately $43,000.00 still due in bills payable to the First of Los Angeles, and, if I remember correctly, I took the matter up of these bonds and county warrants and was trying to raise the money on them and get the money from the county in order to liquidate the outstanding bills payable with the First National of Los Angeles.

Mr. WILSON.—Just a minute. I move to strike the question and answer as being immaterial and not tending to prove any issue in this case.

The COURT.—What is the purpose of it?

Mr. RYAN.—If your Honor pleases, there is some testimony that the County Treasurer would have taken some funds to pay certain of these warrants.

Mr. WILSON.—Before the bank closed.

Mr. RYAN.—Before the bank closed but, when they are presented in due course of business by the successor of the business, who by law acquired and has title to all of those assets, they were not paid and still, according to the records, appear to have not been paid on February 25, at the commencement

(Testimony of J. S. Dodson.)

of this suit as bearing upon the question of whether Mr. Schaefer's ideas of what he could pay were warrants by the circumstances.

Mr. WILSON.—Apart from the immateriality of the statement of the counsel, the fact was that the Treasurer was enjoined by this court from paying these warrants as an independent—

Mr. RYAN.—Not at that time.

The COURT.—Q. To whom did you present them to?

A. I could not say that I really presented them in person to anyone but I took the matter up with the County Treasurer's office and I was informed that there was no money to pay them.

Mr. WILSON.—Objected to, if the Court please, because it was apparent that the money was in the Bank of Winslow and the County Treasurer had a right to refuse to pay them under the circumstances. He was strictly within his right and probably within his lawful duty. I reiterate my objection.

Mr. RYAN.—The fact is that there is no proof that there was any money in the Bank of Winslow to pay these particular warrants. The testimony is that the Treasurer had some money somewhere with which to pay.

The COURT.—He thought he had $51,000.00 in the Bank of Winslow.

Mr. RYAN.—That is the testimony.

The COURT.—He should have had it there too.

(Testimony of J. S. Dodson.)

Mr. RYAN.—I agree with you there but it appears that he did not have money except—

The COURT.—The objection to this question will be sustained.

Mr. RYAN.—Take an exception, your Honor. I think that is all.

Mr. McLAUGHLIN.—At this time, we offer to prove by the witness on the stand that immediately subsequent to the closing of the Bank of Winslow on the 4th day of October, 1924, and prior to the issuance of a restraining order in this proceeding the witness on the stand, as Special Deputy Superintendent of Banks, asked the County Treasurer to cash these warrants.

The COURT.—You just interrogated the witness. I think that when the witness says that he—that your offer includes more than you can elicit from him. You had better ask the question for the record.

Mr. McLAUGHLIN.—Q. Did you at any time, Mr. Dodson, subsequent to the taking over of the bank and prior to the issuance of a restraining order in this case ask Mr. Schaefer to cash these warrants?

A. I discussed the matter with him quite frequently up until the—

Mr. WILSON.—I repeat my objection, if the Court please.

The COURT.—The objection is sustained.

Mr. RYAN.—Take an exception.

(Testimony of J. S. Dodson.)

Mr. McLAUGHLIN.—An exception. Q. When did you have a conversation with Mr. Schaefer with reference to cashing these warrants?

Mr. WILSON.—I repeat my objection to that question.

The COURT.—Same ruling. Sustained.

Mr. McLAUGHLIN.—Therefore, your Honor, we continue with our offer of proof. At this time, we offer to prove by the witness on the stand that shortly subsequent to taking over the Bank of Winslow by the Superintendent of Banks pursuant to statutes and under the supervision and control of the Superior Court of Navajo County, Arizona, the witness on the stand, as Special Deputy Superintendent of Banks, asked the County Treasurer to cash these warrants but was informed by the County Treasurer that as to these warrants there were no funds available, the warrants referred to being the registered warrants referred to heretofore frequently in this litigation.

Mr. WILSON.—If the Court pleases, I object to that as immaterial, and for the further reason that it now appears that the witness will testify to no such facts.

Mr. McLAUGHLIN.—I think that last statement is uncalled for, your Honor. There is no showing what the witness will testify to. He has not been allowed to testify.

Mr. WILSON.—Questions were asked him and he did not testify to any such fact.

The COURT.—Your question limits the time until after the 4th of October?

Mr. McLAUGHLIN.—After the 4th of October.

The COURT.—Objection sustained.

Mr. RYAN.—Take an exception.

Mr. McLAUGHLIN.—Except on our behalf.

The COURT.—You say you had some additional evidence to offer?

Mr. McLAUGHLIN.—If your Honor please, the defendants have some. Mr. Ryan has some to offer.

Mr. RYAN.—I have some documentary evidence here. I would like to have the Clerk mark this as an exhibit for identification, if you will.

The COURT.—Mark it the appropriate number of defendants—appropriate letter, I believe it is.

The CLERK.—I think it will be "E." As one exhibit or are there two parts?

Mr. RYAN.—There are two sheets but it is all one current subject.

The COURT.—Mark it one exhibit.

The CLERK.—Defendant's Exhibit "E."

Mr. RYAN.—I am offering this Defendants' Exhibit "E" for identification, which purports and is a published record of the proceedings of the Board of Supervisors of Navajo County and shows what purports to be adopted *budge*—finally adopted budget and estimated expenditure made by that county made pursuant I claim the law to be and published after adoption, as the law required it to be published. I offer this last paper—official publication exhibiting for itself.

(Testimony of A. T. Hammons.)

The COURT.—You offer it in evidence?

Mr. RYAN.—Yes.

Mr. WILSON.—Objected to as immaterial, if the Court pleases. We don't think this has anything to do with the issues in this case. The budget prepared by the Board of Supervisors does not indicate, nor does it prove, what was collected and on hand in the different funds on October 4, 1924, and our claims originate upon that date and because of the condition of the bank at that date and the condition of the Treasurer's office on that date as regards moneys in these different funds, I can't see the materiality of it for that reason and we object to it on that score.

(Argument.)

The COURT.—Objection is overruled. It may be admitted.

Mr. WILSON.—Exception.

The CLERK.—Correct that last offer to show it "D" instead of "E."

TESTIMONY OF A. T. HAMMONS, FOR DEFENDANTS.

A. T. HAMMONS, having been heretofore duly sworn, was called as a witness on behalf of the defendants and first duly sworn and testified as follows:

Direct Examination by Mr. McLAUGHLIN.

I testified last week that I took charge of the Bank of Winslow as Superintendent of Banks of

(Testimony of A. T. Hammons.)

the State of Arizona on October 4, 1924, and subsequent thereto filed in the Superior Court of Navajo County the inventory return required by statute. At the time that this suit was commenced, I was acting under the orders of the Superior Court of Navajo County. I am still acting in the same capacity with reference to the liquidation of the Bank of Winslow.

(Thereupon defendants rested.)

TESTIMONY OF GEORGE J. SCHAEFER, FOR PLAINTIFF (RECALLED).

GEORGE J. SCHAEFER, having been heretofore duly sworn, was recalled for further examination on behalf of the plaintiff and testified as follows:

Direct Examination by Mr. WILSON.

Q. Mr. Schaefer, when you were on the witness-stand the other day, you testified, if I remember rightly, that the salary fund had nearly enough to take up all of the warrants then outstanding on October 4, 1924, but perhaps not quite enough. Do you desire to correct that testimony? A. I do.

Q. Will you state the facts as to that?

A. The only correction I have—

Mr. RYAN.—Just a moment. I object to the statement of this witness as to what those funds—what appeared by those funds. There is better evidence as to the condition of those funds than the memory of this witness.

Mr. WILSON.—If the Court please, the witness can certainly testify as to his own knowledge as to whether he had money enough on October 4, 1924, to meet all of the salary warrants outstanding. He must know what was the condition of his office at that time.

The COURT.—Doesn't he get that information from books, Mr. Wilson.

Mr. WILSON.—Yes, sir, but he must have first-hand knowledge of it as County Treasurer. It is his duty to know it.

Mr. McLAUGHLIN.—I believe, your Honor, that the records themselves would be the best evidence as to the state of the County Treasurer.

Mr. WILSON.—I am willing to put them in if your Honor insists but I think the—just get your records.

Mr. RYAN.—And the further objection to it, if your Honor please, is that it is immaterial what may appear to be a salary fund, because, under the present theory the law of the State of Arizona, there is no distinction between a salary fund and the expense fund and it appears from the testimony already in and from the books that the expense fund, which includes and covers salaries, expenses of offices and other things, was *forth* thousand odd dollars in the red on the 4th day of October, 1924, and no matter if he—

Mr. WILSON.—That is a question of law which your Honor is called upon to decide not at this time.

Mr. RYAN.—It is a question of law.

(Testimony of George J. Schaefer.)

The COURT.—That objection will be overruled.

Mr. McLAUGHLIN.—Note an exception on behalf of Hammons and Dodson.

Mr. RYAN.—An exception.

Mr. STOCKTON.—Does your Honor have in mind that the statute says that the salary claims are included within the expense fund?

Mr. WILSON.—It is a question of apportionment.

The COURT.—You may cross-examine as to that and if he testifies, you may call—

Mr. STOCKTON.—I reserve the right to my cross-examination, hoping we were going to get through without putting in any evidence.

(Witness produces books.)

Mr. WILSON.—Q. Now, Mr. Schaefer, you have the books of your office?

A. Yes, sir.

Q. Will you turn to your salary account. Will you state what your balance was on October 4, 1924?

Mr. STOCKTON.—If your Honor please, on behalf of the interveners, we object to a statement of the witness from his books with reference to a salary account, for the reason that the law does not provide that any designation or distribution shall be made in the form of salaries or moneys for salaries—accounts in general and I wish to call your Honor's attention to two paragraphs of our code in that connection. (Reading.)

(Argument.)

(Testimony of George J. Schaefer.)

The COURT.—Objection is overruled.

Mr. STOCKTON.—An exception, please.

Mr. RYAN.—An exception on the part of all the original defendants.

Mr. BARTH.—Exception on the part of intervenor Apache County.

Mr. WILSON.—Q. Will you state what was on that salary account on October 4, 1924, from your books?

Mr. STOCKTON.—We object to that on the further ground that it is calling for a conclusion of the witness as to that date. If he gives the specified dates of transfers to that fund and from what it was transferred, we would have no objection.

The COURT.—You will have an opportunity to ascertain that on cross-examination. The objection is overruled.

Mr. STOCKTON.—An exception, please.

Mr. RYAN.—An exception.

A. $5,345.41.

Mr. WILSON.—Q. Now, Mr. Schaefer, have you examined your registration record for warrants and can you state from that examination whether on that date you had enough money to take up your salary warrants then outstanding?

Mr. RYAN.—I object to that. He is referring to a record which will be the best evidence of the existence of registered warrants.

The COURT.—Isn't there evidence in the case as to the amount of those warrants?

(Testimony of George J. Schaefer.)

Mr. STOCKTON.—No. That is the objection I was going to make, that is, that the amount of the outstanding warrants is an immaterial issue.

The COURT.—Salary warrants?

Mr. STOCKTON.—Yes. From which the Court will then determine. That is not in the record. We object to the question because it calls for a conclusion of the witness. We have no objection to his telling how many outstanding warrants there were.

(Argument.)

The COURT.—Overruled.

Mr. McLAUGHLIN.—Exception.

Mr. WILSON.—Q. Will you state whether, Mr. Schaefer, from your registration book you can compute the number of outstanding warrants, not including those pledged to you by the Bank of Winslow on October 4, 1924? Can that be done from your record?

Mr. STOCKTON.—We object to that question upon the grounds that it is immaterial whether he can compute them or not by excluding those pledged to him as Treasurer of Navajo County. The question, if it is material at all, must relate to all outstanding salary warrants.

The COURT.—He may compute those outside of those that were pledged and you can cross-examine him. Objection is overruled.

Mr. WILSON.—Q. Will you do that?

A. Here is the point—the reason for my correction, if I may explain it. I stated that there was

(Testimony of George J. Schaefer.)

over $6,000.00 in salary warrants outstanding but in that I included fourteen hundred seventy some odd dollars of back salary warrants that were issued two or three years prior to my time and were in litigation in court at the time and my understanding at the time was that they were to be charged to the salary fund and I found later that there was to be a back salary fund and they were to be charged to that and I included those in these warrants and I wanted to correct it. My report shows that I charged to the general fund before those particular warrants for the back salary funds.

Mr. WILSON.—That is the situation. I am not very certain, under the circumstances, how I ought to proceed; I will put the registration book in and ask him the question and then it is a matter of computation for anybody. Of course, I will put in his computation.

The COURT.—You needn't introduce the book. You may read from it any entries.

Mr. WILSON.—It will take a long time to put them all in. There are a great many small items.

The COURT.—Oh, I see.

Mr. STOCKTON.—So far as we are concerned, we have no objection to the witness stating how many outstanding warrants unpaid there were on that date. We don't care about him taking up each individual one of them. Our objection was as to his conclusion as to what was in the fund.

A. Mr. Ryan can help me on that. I run a tape for Mr. Ryan last Tuesday of outstanding warrants

(Testimony of George J. Schaefer.)

other than those that the Bank of Winslow held and, if he can furnish such a tape, I can—

Mr. RYAN.—If you run such a tape for me, I don't remember it.

Mr. McLAUGHLIN.—I believe I have that. I am not sure that I have.

Mr. RYAN.—Q. Now, isn't it a fact—excuse me—isn't it a fact that that tape that you made in my office was amounts of warrants which were registered prior to October 4, 1924, and still outstanding as to date July 1, 1925?

A. Yes, sir.

Q. So that tape and no computation that you have made would be a basis of showing how many actual registered warrants on the salary fund were outstanding on October 4, 1924?

A. Yes, sir.

Q. You haven't computed it, have you?

A. I can tell from that tape within a very little amount, I imagine.

Q. Could you tell from the tape?

A. From that tape that we run off the other day.

Q. Well, that tape and that computation included those that remained outstanding in July, 1925, and still unpaid?

A. Yes, sir, because I did not take up any after that, because of the shortage of money due to bank failure. They stayed outstanding until we floated a bond issue.

Mr. RYAN.—If your Honor please, it may take some time but it is material in this case. It is a

(Testimony of George J. Schaefer.)

material feature in this case as to the total number of outstanding warrants of Navajo County at the time this bank failed. If there is any book here, I would like to be permitted to insist upon strict proof according to the records which the law requires the County Treasurer to make and keep of registered warrants. It requires him to keep a warrant register in which the dates, numbers and amounts are registered in the order of presentation.

The COURT.—Q. Do you have that record, Mr. Schaefer?

A. Yes, sir.

Q. Can you produce it, can you not?

Mr. WILSON.—It is right here.

A. Yes, sir.

The COURT.—Q. How long will it take you?

A. To list them and all?

Mr. STOCKTON.—Read them into the record.

A. It will take quite a while.

Mr. WILSON.—You will make a record two days long.

The COURT.—Can't you gentlemen examine that and stipulate as to that?

Mr. RYAN.—We have tried to examine it at one time, if your Honor please, and the items are marked up and when you get down to, as we sometimes say, brass tacks, the books don't show and the witness don't know at the particular time when these warrants were paid or registered.

Mr. WILSON.—If the Court please, I take objection or exception to that remark. The point

is there is outstanding certain warrants of the Bank of Winslow and they have been offered in evidence. There are certain warrants in the hands of the treasurer of Apache County and they are here, although the list has been admitted all of the way through as being a true list without the original warrants.

Mr. BARTH.—I object—

Mr. WILSON.—Just a minute.

Mr. BARTH.—If the Court please, to being admitted—

The COURT.—I can't hear you both at once. Let him finish and then I will hear you.

Mr. WILSON.—What I mean is that they have attached to their own pleading a copy of all of those warrants. Therefore, they can't deny that they have them. Now, the point is that outside of those held by the Bank of Winslow or pledged to Navajo or Apache County, there seems to have been very few warrants, and so far as the witness is concerned, I assume he would have very little trouble in digging those others out. All of the rest of them are in here and he could take out all of those that are not in evidence or in the record now in a very short while, if it is required. My own view of that was that it was not going to be required, because we had practically gone over this record in the afternoon the day that we come on in beautiful Phoenix. It was admitted that there were no doubt about certain figures and as regards the salary figure, that was slightly erron-

(Testimony of George J. Schaefer.)

eous. His testimony is correct as regards that particular item except that he said $6,000.00 instead of $5,000.00 and he wanted to correct it and I am putting him here for that purpose.

Mr. RYAN.—If your Honor please, might I suggest, before any computation be made that we be permitted to examine the witness as to what his so-called warrant book from which that computation is to be made does and does not show as a matter of definite record?

The COURT.—Yes, you may examine it in his presence.

Mr. RYAN.—I mean, for the record, before we go into having some computation made by the witness from the book.

The COURT.—Yes, you may do that. I want to suggest to you that you had better finish this matter before to-morrow night, because if you don't, you won't have any Court here to take care of it.

The COURT.—Q. Mr. Schaefer, turn to your salary register. Do you keep that registry-book with respect to separate funds?

A. Yes, sir.

Q. Now, from what date of start to what date of finish does this book that you call the warrant register cover? A. July 1923.

Q. This particular salary fund, confine it to that one.

A. September, 1925.

Q. Commencing at the beginning of the entries

(Testimony of George J. Schaefer.)

on this book, there were some registered—there were some registry warrants—some warrants outstanding that were carried along from 1923—I think you said that to-day? A. Yes, sir.

Q. In your explanation. Now, turn to the time that you paid those warrants and read into the record what entries you have made with respect to that payment. A. What?

Q. You say that you have refreshed your memory and changed your testimony since you were on the stand first?

A. Yes, but I don't get your question, Mr. Ryan. If I have to have an attorney in here to protect me in your questions, I am going to get one. I don't like to be boobed on the stand like this.

Q. You say you made a mistake in your figures the other day because of the fact that there was some 1923 warrants that had been carried along, and in your testimony the other day you did not know what disposition and you found that they had been paid?

The COURT.—Warrants that were in litigation.

A. There were older warrants in litigation. They were considered back salary warrants and I had never seen them but I knew there were some salary warrants that were in the court.

Q. Where do those warrants appear upon that record?

A. I don't know. It is far before my time.

(Testimony of George J. Schaefer.)

Mr. WILSON.—He has already testified it was before his time and that book starts on July, 1923.

Q. Now, back at the first warrant that appears registered in this book, that is your time, is it not, this book? A. Yes, right there.

Q. What is that item? A. Warrant No. 2317.

Q. How much?

A. Treasurer's No. 1 for $75.05.

Q. Does it show when that was paid?

A. Yes, sir, paid May 10, 1924.

Q. Now, the next five warrants, does this show when they were paid? A. Same date.

Q. This other item here is simply marked paid. Read that item across—I mean here—see.

The COURT.—These are all salary warrants?

A. Yes, sir. It reads Warrant No. 3212, Register No. 9, in the amount of $75.00.

Mr. RYAN.—Q. That is marked paid. Is there anything in the books to indicate when it was paid?

A. Only by my cash book is the only way I can prove that.

Q. Now, there is two other items on that same page 32 are the only indication with respect to warrants that they are paid; is that not true?

Mr. WILSON.—If the Court please, I can't see the materiality of this line of questioning. Those warrants that he says he is pointing out now are not involved in this case. They are paid and, regardless of whatever records he made of that fact, they are not involved in this case.

(Testimony of George J. Schaefer.)

The COURT.—Q. When does the record show they were paid?

A. There is a few just plainly marked paid here.

Mr. RYAN.—May I show this book to your Honor?

A. And no date. The date is not in there. We work by the cash-book.

The COURT.—Q. You can't tell by this book?

A. No, sir.

Mr. RYAN.—They are marked paid. There is no record.

Mr. WILSON.—It is marked paid. What is the materiality of it, may I ask, if the Court please? He is making a large point out of the fact when there is no date in there when he has records in his office which would prove the date. That is not material if it is paid and it appears in his record they are paid and that is the ultimate fact.

Mr. RYAN.—Q. Now, I call your attention to Warrants No. 2330, 2319, 2318, 2310, 2336, 2308, 2324, 2326, and ask you whether or not from the book before you those warrants do not still appear to be outstanding?

A. They were with the Bank of Winslow when they quit.

Q. How do you know they were with the Bank of Winslow?

A. I know those particular warrants that you

(Testimony of George J. Schaefer.)

have had listed here were in among those warrants.

Q. There is no evidence on the book to show where they are located, is there?

A. No—yes, it does—Merchants and Stock Growers Bank. That is the Holbrook branch of the Bank of Winslow.

Q. What is the situation with reference to the next page? There are a lot of warrants marked paid on page 33 and no date of payment appears, is there not? A. Yes, sir.

Q. And the same appears on page 34—there are several warrants there that—Union Bank & Trust Co.—do you know when you paid those warrants?

A. Not from this record I do not.

Q. Now, on page 35 there is no date at all as to the time you paid any warrants? A. No, sir.

Q. And the first fourteen warrants appear unpaid, do they not? A. Yes, sir.

Q. Page 36, there is no entry of warrants paid, with no date as to when they were paid?

A. No, sir.

Q. Then, as a matter of fact, you cannot compute from that book the amount of warrants outstanding and unpaid against the salary fund independent of your memory, now. I am asking you from the book itself?

A. I am trying to figure out whether I can or not. Not accurately, I can't.

Q. Not accurately? A. Not from this alone.

The COURT.—Q. But you can from that—

(Testimony of George J. Schaefer.)

A. I use a cash-book in connection with this.

Q. Is that here? A. No, sir.

Mr. RYAN.—I move to strike from the record all testimony of this witness relative to the warrants outstanding on the date October 4, 1924.

The COURT.—You can't say definitely what was outstanding?

A. I can from these lists that were put in evidence. I have testified to those lists previous to this time.

Mr. WILSON.—If the Court please, I might state that the list which was compiled as a true copy of his records was introduced and offered without any objection and it is in evidence now. Those were three records, dividing the various ones 1, 2, 3, 4 and they are already in the record as regards those which are outstanding or were outstanding on October 4, registered from October 4, 1923 to October 4, 1924, and that record of those outstanding is what he testified to and that has been the basis of the subsequent—

Mr. STOCKTON.—May I ask a question, Mr. Wilson?

Mr. WILSON.—Yes.

Mr. STOCKTON.—Q. The list that you referred to do not pretend to show the outstanding warrants but only those that were outstanding and involved in this litigation?

Mr. WILSON.—To-day?

(Testimony of George J. Schaefer.)

Mr. STOCKTON.—The list that you referred to do not pretend to show a list of all the outstanding warrants?

Mr. WILSON.—No.

Mr. STOCKTON.—Only a list of those that are involved in this litigation?

Mr. WILSON.—These lists contain all, whether or not held by the Bank of Winslow, if I am correct—I think I am correct in that.

Mr. RYAN.—Yes, but with due respect, it says lists of warrants unpaid May 25, 1925. No evidence as to what was—that, that is—

Mr. WILSON.—Warrants issued by Navajo County, Arizona, on expense fund registered October 4, 1923, to October 4, 1924, unpaid on May 25, 1925. We do not go back to October 4, 1924, and these show the list that were unpaid at any subsequent date. It may have been any other date but it only shows those that were registered prior to October 4, and which were then outstanding. That is all.

(Argument continued.)

Mr. STOCKTON.—I should like to ask the witness just one question, if I may, which I think would elicit the whole situation.

A. Mr. Schaefer, Plaintiff's Exhibit 162 in evidence, which I hold in my hands, says, under a column designated "Held by," a lot of initials, I will ask you if every single one of them does not refer to the Bank of Winslow or some of its branches?

(Testimony of George J. Schaefer.)

A. Except the first item. That is an original—Arizona State. With the exception of the first one, which is the Arizona State, which later become a part of the Bank of Winslow.

Q. Then all of the warrants shown by Plaintiff's Exhibit 2 are warrants which on October 4, 1924, was held by the Bank of Winslow?

A. Yes.

Q. And there is not shown on Plaintiff's Exhibit 162 in evidence warrants theretofore issued and registered and outstanding held by any other party, is there? A. No.

Q. There were other warrants? A. Yes.

Mr. STOCKTON.—Now, if the Court please, that is typical, as I understand the—

A. I don't know. I think I checked that the other day. I don't know whether I found any other or not.

(Argument by counsel.)

Mr. WILSON.—May I expedite this a little bit, if the Court please? We will agree that Mr. Schaefer and counsel may take this registration book and check it off and see how many warrants there were outside of those that are in the record in this warrant book. I doubt if they find any except in the salary fund.

The COURT.—And the total amount of them, is that what you want?

Mr. WILSON.—The total amount.

(Testimony of George J. Schaefer.)

Cross-examination by Mr. McLAUGHLIN.

We occasionally omit one of the registered warrants on the warrant register. We register a warrant and fail to record it. There are some registered warrants, to my knowledge, that are not entered in this warrant register. I know of about six that I saw on my desk the other day. There are two entered in the wrong name and four omitted. They are all registered but not entered —I can vouch for the verity of the warrant register by my own check. If I took this blue-print of mine and those two, my cash proves the date of payments. I do not have the cash record with me. And I don't want to be understood at this time as stating that the warrant register is absolutely correct.

Mr. McLAUGHLIN.—Then, if your Honor please, we believe that subject to the objection that it is incompetent. It is unreliable. It is not a correct set of books and we move to strike all of the evidence of this witness bearing upon this set of books, which are admittedly unreliable.

The COURT.—Q. Have you seen the warrants that are omitted?

A. Yes, sir.

Q. All of them?

A. I think so. I made a more correct and an absolute accurate list, I think, in July, which included all of these.

Q. Where is it?

(Testimony of George J. Schaefer.)

A. Right on that desk over there.

The COURT.—I am not going to waste my time sitting here listening to this. If you can get together and look those records over and stipulate and agree to anything, very well, why, come in and thresh it out.

(Argument between Court and counsel.)

The COURT.—It is a question of whether or not it was appropriated to the salary account properly. It don't make any difference to me whether the money was in the Bank or not but whether or not this particular fund has been properly handled.

Mr. STOCKTON.—We want to find out, as far as we are concerned, by what process the fund—

The COURT.—As far as set-off is concerned, it is the depositary money in the bank that could be set off as against the warrants.

Mr. BARTH.—Why, I think not. I think that in addition to that—

The COURT.—I think you will find that the judgment of this Court will go to that extent.

Mr. BARTH.—Regardless of whether he had any money there?

The COURT.—Regardless of whether the money was there in the bank or not. If he deposited the money in the bank, even at that time when the bank failed and it was not a day there.

Mr. BARTH.—Then, the Court would rule that it was available if he had deposited it? Now this is our view—

The COURT.—It is available for set-off.

(Argument of counsel.)

Mr. WILSON.—Now, if your Honor please, with that statement, we will specifically state for the record that so far as we are concerned we are content with the proof, because it shows that these warrants are already in evidence and it shows from his books funds that could be offset against those warrants. Now, that is all there is.

Mr. STOCKTON.—You are withdrawing the witness, then, are you?

Mr. WILSON.—We don't care one way or the other. I wanted to give the witness a chance to correct himself.

THEREUPON, at the hour of 4:55 P. M., the court took recess, and at the hour of 9:45 A. M., January 12, 1926, counsel being present, the following proceedings were had:

The COURT.—Gentlemen, in the Bank of Winslow, the question of the right of set-off, it won't take you long to submit that and without any lengthy arguments? I think I am interested in knowing what the duties of the receiver are in adjusting the affairs of the county and bank—County of Navajo—if it is his duty to offset against the deposits of warrants held by the bank.

Mr. WILSON.—We are prepared to argue and I think I can submit it in twenty minutes.

Mr. STOCKTON.—I should like to say this, if your Honor please, as far as we are concerned, an examination of these records, going over it

with Mr. Schaefer, discloses to our satisfaction that while there is an apparent overdraft from the general expense account, it is one that was inherited by him—one that has been reduced by him during his administration and, in the expense account as it would effect any moneys in the hands of Navajo County, he has received more money property distributed to the expense account than he has paid out of the expense account, so that we do not care to further pursue the cross-examination indicated last evening.

The COURT.—How about the other defendants?

Mr. STOCKTON.—An examination of this record shows that he receipts for more money.

The COURT.—How about the other defendants? Do they care to go into that? We will take up these arguments now.

(Arguments.)

The COURT.—Now, Mr. Wilson, the question of the right of receiver, what are the receiver's duties in adjusting the affairs?

(There was then some discussion and argument by Court and counsel, as to the rights of the interveners, with which the appellants herein are not concerned.) Thereupon all parties rested.

It is further stipulated and agreed at the time of the trial of the case and thereafter, which stipulation does not appear in the transcript of evidence, that the actual amount of school warrants as shown by the evidence was Six Thousand, Three Hundred Thirteen and 38–100 ($6,313.38) Dollars, notwithstanding any discrepancy between these fig-

ures and those shown by a computation of the list of school warrants and the warrants produced by the Superintendent of Banks at the time of trial.

PLAINTIFF'S EXHIBIT No. 1.

SCHOOL WARRANTS.

GENERAL FUND.

Warrant No. 61.

Holbrook, Arizona, September 6, 1924.

THE TREASURER OF NAVAJO COUNTY:

Pay to the order of Bank of Winslow, $366.66, THREE HUNDRED SIXTY-SIX and 66–100 DOLLARS, and charge to School District No. 1, on account of teaching in said School District. This warrant shall draw interest at the Rate of ....% from the date this warrant is marked NO FUNDS BY THE COUNTY TREASURER.

Signed, KATE V. KINNEY,
County School Superintendent.

NOTE:—Interest on this Warrant shall stop when the County Treasurer has given notice that there are funds to the credit of this School District for payment of this Warrant.

School Warrant Navajo County, Arizona.

Exhibit No.	Date	Payee	School District No.	Reg. Date	Amount
2	9–29–24	Holbrook Brch. B. of W.	3	10– 2–24	$345.00
3	9–30–24	Holbrook Brch. B. of W.	16	10– 2–24	4.70
4	9–30–24	Holbrook Brch. B. of W.	7	10– 2–24	140.00
5	9– 4–24	Holbrook Brch. B. of W. Union High		9– 7–24	10.00
6	9–27–24	Chas. F. Hansen	11	9–29–24	150.00
7	8–20–24	Holbrook Brch. B. of W.	3	8–22–24	829.00
8	9–13–24	Holbrook Brch. B. of W. Union High		9–16–24	97.10
9	9–19–24	Bank of Winslow	1	9–29–24	19.50
10	8–20–24	Holbrook Brch. B. of W.	10	8–23–24	18.00
11	8–25–24	Holbrook Brch. B. of W.	2	8–30–24	47.30
12	9–13–24	Holbrook Brch. B. of W.	10	9–16–24	91.05
13	9–16–24	Holbrook Brch. B. of W.	3	9–19–24	150.00

Exhibit No.	Date	Payee	School District No.	Reg. Date	Amount
14	9–19–24	Bank of Winslow	1	9–20–24	15.00
15	9–16–24	Bank of Winslow	1	9–18–24	15.00
16	9–16–24	Bank of Winslow	1	9–18–24	177.23
17	9–29–24	Bank of Winslow	1	10– 3–24	2102.32
18	9–30–24	Bank of Winslow	1	10– 3–24	120.00
19	9–30–24	Bank of Winslow	1	10– 3–24	154.80
20	9–13–24	Bank of Winslow	1	9–17–24	25.80
21	9–13–24	Bank of Winslow	1	9–17–24	280.00
22	9– 6–24	Cooley Lumber Co.	10	9–11–24	86.26
23	8– 2–24	Public School Pub. Co.	5	8–23–24	36.09
24	9–10–24	D. G. Younkin	3	9–15–24	250.00

PLAINTIFF'S EXHIBIT No. 25.

The Board of Supervisors, Navajo County.

No. 1396.

Holbrook, Arizona, August 30, 1924.

THE TREASURER OF NAVAJO COUNTY.

Will pay to the order of L. B. Owens, $75.00, Seventy-five and no–100 Dollars, in payment of Claim No. 1396, for last half August, and charge to Road Fund.

Signed, C. E. OWENS,
Chairman, Board of Supervisors.

Signed, WALLACE ELLSWORTH,
Clerk, Board of Supervisors.

Exhibit No.	Date	Payee	Reg. Date	Amount
26	9–15–24	L. B. Owens	9–17–24	$ 75.00
27	9–15–24	F. B. Gardner	9–17–24	75.00
28	9– 3–24	C. L. Rhoton	9–17–24	4.00
29	9– 3–24	Liona Penrod	9–20–24	35.00
30	9– 3–24	Old Trails Garage	9–29–24	1.50
31	9– 3–24	Carduff Transfer Co.	9– 9–24	10.00
32	9– 3–24	W. J. Larson	9–17–24	8.00
33	9–30–24	L. B. Owens	10– 2–24	75.00
34	9–15–24	A. T. & S. F. R. R. Co.	9–20–24	36.00
35	9– 3–24	Louis E. Johnson	9–29–24	19.25
36	9– 3–24	J. W. Nikolaus	9–15–24	45.00
37	9– 3–24	John T. Flake	9–13–24	28.00
38	9– 3–24	John T. Flake	9–13–24	27.00
39	9– 3–24	Wayne Larson	9–13–24	25.00
40	9– 3–24	S. P. Fish	9– 4–24	23.80

Exhibit No.	Date	Payee	Reg. Date	Amount
41	9- 3-24	Chas. H. Turley	9- 9-24	28.00
42	9- 3-24	Standard Oil Co.	9-11-24	54.03
43	9- 3-24	Union Oil Co.	9-11-24	97.37
44	9- 3-24	Wayne Webb	9-12-24	50.00

PLAINTIFF'S EXHIBIT No. 96.

ROAD FUND WARRANTS.

No. 2614.

SALARY WARRANT.

Office of

Board of Supervisors, Navajo County, Ariz.

Holbrook, Arizona, September 30, 1924.

TREASURER OF NAVAJO COUNTY:

Pay to the Order of J. E. Crosby, Sixty-two and 50–100 Dollars, $62.50, in payment of Salary Demand No. 7, audited and allowed by the Board of Supervisors, September 3, 1924.

Signed, C. E. OWENS,

Chairman of the Board of Supervisors.

Signed, WALLACE ELLSWORTH,

Clerk of the Board of Supervisors.

Reg. Date October 4, 1924.

Exhibit No.	Date	Payee	Reg. Date	Amount
97	9–30–24	Geo. Woolford	10– 4–24	$ 37.50
98	9–30–24	Harvey Ballard	10– 4–24	3.50
99	9–30–24	Jno. L. Fish	10– 3–24	8.00
100	9–30–24	Fred Williams	9–30–24	30.00
101	9–30–24	L. D. Divelbess	10– 2–24	125.00
102	9–30–24	O. C. Williams	10– 1–24	75.00
103	8–30–24	Jno. L. Fish	9– 9–24	4.00
104	8–30–24	F. W. Freeman	9– 7–24	7.50
105	9–15–24	Harvey Smithson	9–20–24	2.00
110	9–30–24	L. F. McClanahan	9–27–24	32.50
111	8–30–24	Harvey Ballard	9–15–24	3.50
112	9–15–24	W. C. Williams	9–16–24	75.00
113	9–15–24	G. T. West	9–16–24	125.00
114	9–15–24	J. E. Crosby	9–16–24	62.50
115	8–30–24	C. C. Williams	9– 4–24	75.00

Exhibit No.	Date	Payee	Reg. Date	Amount
116	8–30–24	L. D. Divelbess	9– 4–24	125.00
117	8–30–24	D. W. Easley	9– 4–24	41.67
118	7–31–24	N. W. Petersen	9– 9–24	4.00
119	8–30–24	Willard Whipple	9– 9–24	5.00
120	8–30–24	G. W. Woolford	9– 9–24	37.50
121	8–30–24	N. W. Peterson	9–11–24	4.00
122	8–15–24	Jos. L. Peterson	9–11–24	4.00
123	8–15–24	R. L. Ison	8–30–24	4.00
124	8–30–24	J. W. Crosby	8–30–24	62.50
125	8–15–24	D. W. Easley	8–30–24	41.67
126	8–15–24	J. W. Freeman	8–30–24	7.50
127	8–15–24	W. B. Porter	8–29–24	2.00
128	8–15–24	Harvey Ballard	8–26–24	3.50
129	7–15–24	Harvey Smithson	8–26–24	2.00
130	8–15–24	Jos. L. Peterson	8–23–24	4.00
131	8–15–24	C. W. Owens	8–20–24	50.00

Exhibit No.	Date	Payee	Reg. Date	Amount
132	8–15–24	J. L. Fish	8–20–24	4.00
133	9–15–24	Harvey Ballard	9–19–24	3.50
134	9–15–24	Fred Williams	9–19–24	30.00
135	9–15–24	L. D. Divelbess	9–17–24	125.00
136	9–15–24	Thorwald Larson	9–17–24	83.34
137	9–15–24	D. W. Easley	9–17–24	41.67
138	8–30–24	L. H. Brewer	9– 9–24	1.25
139	8–30–24	J. W. Bazell	9– 5–24	25.00
140	8–30–24	Sam W. Proctor	9– 5–24	41.67
141	8–30–24	J. E. Walker	9– 3–24	100.00
142	8–30–24	L. C. Henning	9– 3–24	75.00
143	8–30–24	Thorwald Larson	9– 4–24	83.34
144	8–30–24	W. G. Payne	9– 4–24	41.67
145	9–15–24	Sam W. Proctor	9–19–24	41.67
146	8–15–24	Sam W. Proctor	9–19–24	41.67
147	9–15–24	L. C. Henning	9–18–24	75.00

Exhibit No.	Date	Payee	Reg. Date	Amount
148	9–15–24	W. G. Payne	9–17–24	41.67
149	9–15–24	J. W. Walker	9–17–24	100.00
150	8–15–24	L. H. Brewer	8–22–24	1.25
151	9–30–24	L. C. Henning	10– 3–24	75.00
152	9–30–24	J. W. Walker	10– 2–24	100.00
153	8–30–24	W. B. Porter	9–17–24	2.00
106	9–15–24	J. T. Cooper	9–20–24	5.00
107	9–15–24	Geo. Woolford	9–20–24	37.50
108	9–15–24	R. L. Ison	9–20–24	4.00
109	8–30–24	R. O. Ison	9–20–24	4.00

PLAINTIFF'S EXHIBIT No. 154.

Marked for Identification only. Case No. E.-93, Prescott. Admitted and filed Jan. 7, 1926.

GEORGE J. SCHAEFER,
Treasurer.

Office of

TREASURER OF NAVAJO COUNTY

EX-OFFICIO TAX COLLECTOR, HOLBROOK, ARIZONA.

Holbrook, Arizona, April 23, 1923.

Receipt for bonds: Received of the Arizona State Bank of Winslow, Arizona, Thirty-five (35) Improvement bonds of the Town of Winslow, following numbers and amounts.

Bond Number 2	$ 500.00
Bond Number 3	500.00
Bond Number 4	500.00
Bond Number 5	168.84
Bond Number 6	500.00
Bond Number 7	500.00
Bond Number 8	500.00
Bond Number 9	500.00
Bond Number 10	168.85
Bond Number 11	500.00
Bond Number 12	500.00
Bond Number 13	500.00
Bond Number 14	500.00
Bond Number 15	168.84

Bond Number 16	500.00
Bond Number 17	500.00
Bond Number 18	500.00
Bond Number 19	500.00
Bond Number 20	168.85
Bond Number 21	500.00
Bond Number 22	500.00
Bond Number 23	500.00
Bond Number 24	500.00
Bond Number 25	168.84
Bond Number 26	500.00
Bond Number 27	500.00
Bond Number 27	500.00
Bond Number 28	500.00
Bond Number 29	500.00
Bond Number 30	168.85
Bond Number 31	500.00
Bond Number 32	500.00
Bond Number 35	168.84
Bond Number 40	168.85
Bond Number 45	168.84
Bond Number 50	168.85
	$14,188.45

To be held security on County Deposits.

GEORGE J. SCHAEFER,

Treasurer.

PLAINTIFF'S EXHIBIT No. 155.

Marked for Identification only. Case No. E.–93. Admitted and filed Jan. 7, 1926.

Winslow, Arizona, August 3, 1923.

Received of The Bank of Winslow, Winslow, Arizona, the following Registered School Warrants, to be held as guarantee for Navajo County funds deposited in The Bank of Winslow:

School District No. 1, Wrt. No. 151.....$1,015.06
School District No. 1, Wrt. No. 157..... 281.23
School District No. 1, Wrt. No. 158..... 660.50

$1,956.79

GEORGE J. SCHAEFER,
Navajo County Treasurer.

Returned 3–28–24.

PLAINTIFF'S EXHIBIT No. 156.

Marked for Identification only. Case No. E.–93, Prescott. Admitted and filed Jan. 7, 1926.

INDIGENT WARRANTS:

No.	Register No.	Date	Amount
0123	25	8– 8–23	$ 8.00
0126	23	8– 8–23	15.00
0132	25	8– 8–23	10.00
0140	36	9– 5–23	15.00
105	4	7– 5–23	8.00
108	5	7– 5–23	15.00

BOARD OF SUPERVISORS WARRANTS:

No.	Register No.	Date	Amount
884	179	3– 3–24	75.00
867	180	3– 3–24	25.00
880	182	3– 3–24	3.00
832	183	2– 4–24	5.00
1131	145	3– 3–24	35.00
1112	149	3– 3–24	105.00
1129	150	3– 3–24	16.00
864	198	3– 3–24	14.10
856	199	3– 3–24	341.42
1132	170	3– 3–24	21.00
1148	171	3– 3–24	91.00
469	21	7– 5–23	26.30
488		8– 6–23	52.00
624	156	10–16–23	150.00
614	155	10–16–23	29.38
615	154	10–16–23	14.92
553	153	9– 5–23	47.31
583	152	10–16–23	23.75
731	48	8– 8–23	10.55
747	51	8– 8–23	8.05
505	74	8– 8–23	7.62
490	75	8– 6–23	10.00
547	104	9– 5–23	18.20
564	106	9– 5–23	9.30
788	78	9– 5–23	1.20
823	124	10–16–23	8.00

BOARD OF SUPERVISORS SALARY WARRANTS:

No.	Register No.	Date	Amount
2316	71	7–31–23	41.67
2329	21	7–31–23	112.50
2357	70	8–14–23	41.67
2369	33	8–14–23	112.50

SCHOOL WARRANTS:

7	71	7–18–23	103.15
25	79	8– 9–23	874.35
77	125	9–13–23	3.00
41	86	8–29–23	19.00
51	104	9– 8–23	1.80
79	124	9–13–23	8.00
26	80	8– 9–23	1.75
42	87	8–29–23	.75
78	126	9–13–23	300.00

$2,839.24

Receipt is hereby acknowledged of the above registered warrants which are to be held by the Navajo County Treasurer as a guarantee of funds deposited in The Bank of Winslow.

GEORGE J. SCHAEFER,
Navajo County Treasurer.

PLAINTIFF'S EXHIBIT No. 157.

Marked for Identification only. Case No. E.–93, Prescott. Admitted and filed Jan. 7, 1926.

GEORGE J. SCHAEFER,
Treasurer.

Office of

TREASURER OF NAVAJO COUNTY
EX-OFFICIO TAX COLLECTOR, HOLBROOK, ARIZONA.

October 18, 1923.

Mr. Chas. F. Oare, Cashier.
Arizona State Bank,
Winslow, Arizona.

Dear Charlie:

This is to acknowledge receipt of Twenty-five hundred eighty-three dollars and thirty seven cents, ($2,580.37) in registered County Warrants mailed to this office as security on County Deposits in your bank.

Hoping I may find my way clear to sweeten my deposit in the next few days, I am,

Yours truly,
GEORGE J. SCHAEFER.

PLAINTIFF'S EXHIBIT No. 158.

Marked for Identification only. Case No. E–93, Prescott. Admitted and filed Jan. 7, 1926.

THE BANK OF WINSLOW.
Established July, 1910
Winslow, Arizona,

March
Seventeenth,
1924.

Mr. Geo. Schaefer, Treasurer,
Holbrook, Arizona.

Dear George:

We are enclosing herewith registered warrants as per list enclosed, aggregating $2,839.24. These you will kindly hold as a guarantee of County funds deposited in The Bank of Winslow and return to us the Panama Canal Bond for $1,000.00. Also kindly sign the enclosed receipt and hold the copy for your records.

Yours very truly,
B. B. NEEL,
Vice-President.

EBN–AJ
Canal Bond No. 41243.

PLAINTIFF EXHIBIT No. 160.

Marked for Identification Only. Case No. E–93, Prescott. Admitted and Filed January 7, 1926.

WARRANTS ISSUED BY NAVAJO COUNTY ON SALARY FUND.

Registered October 4, 1923 to October 4, 1924.

Wnt. No.	Treas. No.	Date Issued	Date Registered	Issued to	Held by	Amount
2458	93	7–16–24	7–16–24	G. T. West	M&SGB	$125.00
2449	94	7–16–24	7–16–24	O. C. Williams	M&SGB	75.00
2457	95	7–16–24	7–16–24	D. Brinkerhoff	M&SGB	30.00
2446	96	7–15–24	7–17–24	C. G. Payne	BWW	41.67
2442	97	7–15–24	7–17–24	L. C. Henning	BWW	75.00
2453	98	7–15–24	7–17–24	T. Larson	M&SGB	83.34
2461	99	7–15–24	7–17–24	L. F. McClanahan	M&SGB	23.33
2448	100	7–15–24	7–17–24	L. D. Divelbess	M&SGB	125.00
2451	101	7–15–24	7–18–24	J. E. Walker	BWW	100.00
2431	102	6–30–24	7–13–24	J. T. Cooper	M&SGB	5.00
2436	103	6–30–24	7–10–24	Harvey Ballard	M&SGB	3.50
2440	104	7–15–24	7–18–24	J. E. Crosby	BWW	62.50
2444	105	7–15–24	7–20–24	C. E. Owens	BWW	50.00
2473	107	7–15–24	7–20–24	L. H. Brewer	M&SGB	1.25
2450	108	7–15–24	7–22–24	Geo. Woolford	M&SGB	37.50
2459	109	7–15–24	7–22–24	Sam Proctor	BWW	41.67

Wnt.	Treas.	Date	Date Registered	Issued to	Held by	Amount
2470	110	7–15–24	7–23–24	Harvey Ballard	M&SGB	3.50
2466	111	7–15–24	7–23–24	J. T. Cooper	M&CGB	5.00
2463	112	7–15–24	7–23–24	J. O. Freeman	M&SGB	7.50
2467	113	7–15–24	7–26–24	Jos. L. Peterson	BWW	4.00
2495	115	7–31–24	7–31–24	L. F. McClanahan	BWW	32.50
2480	116	7–31–24	8– 1–24	C. G. Payne	BWW	41.67
2485	117	7–31–24	8– 1–24	J. E. Walker	BWW	100.00
2460	121	7–15–24	8– 1–24	D. W. Easley	BWW	41.67
2494	122	7–31–24	8– 1–24	D. W. Easley	BWW	41.67
2474	123	7–31–24	8– 1–24	J. E. Crosby	BWW	62.50
2476	126	7–31–24	8– 2–24	L. C. Henning	BWW	75.00
2501	127	7–31–24	8– 2–24	J. L. Peterson	BWW	4.00
2483	128	7–31–24	8– 2–24	O. C. Williams	BWW	75.00
2492	132	7–31–24	8– 2–24	G. T. West.	M&SGB	125.00
2497	133	7–31–24	8– 7–24	J. O. Freeman	M&SGB	7.50
2499	134	7–31–24	8– 7–24	E. T. Hatch	M&SGB	5.00

Wnt.	Treas.	Date Issued	Date Registered	Issued to	Held by	Amount
2491	135	7–31–24	8– 7–24	D. Brinkerhoff	M&SGB	30.00
2487	136	7–31–24	8– 6–24	T. Larson	M&SGB	83.34
2500	137	7–31–24	8– 5–24	J. T. Cooper	M&SGB	5.00
2484	138	7–31–24	8– 3–24	Geo. Woolford	M&SGB	37.50
2493	147	7–31–24	8–12–24	Sam Proctor	BWW	41.67
2505	149	7–31–24	8-10–24	Harvey Ballard	M&SGB	3.50
2526	151	8–15–24	8–17–24	D. Brinkerhoff	M&SGB	30.00
2522	152	8–15–24	8–17–24	T. Larson	M&SGB	83.34
2518	153	8–15–24	8–17–24	O. C. Williams	M&SGB	75.00
2530	154	8–15–24	8–17–24	L. F. McClanahan	M&SGB	32.50
2509	155	8–15–24	8–17–24	J. E. Crosby	M&SGB	62.50
2506	156	8–15–24	8–17–24	Harvey Smiston	M&SGB	2.00
2508	157	8–15–24	8–14–24	L. H. Brewer	M&SGB	1.25
2503	158	8–15–24	8–15–24	R. L. Ison	M&SGB	4.00
2468	159	8–15–24	8–15–24	R. L. Ison	M&SGB	4.00
2434	160	8–15–24	8–15–24	R. L. Ison	M&SGB	4.00
2531	161	8–15–24	819–24	J. W. Bazell	BWW	25.00

Wnt.	Treas.	Date Issued	Date Registered	Issued to	Held by	Amount
2511	162	8–15–24	8–16–24	L. C. Henning	BWW	75.00
2520	163	8–15–24	8–16–24	J. E. Walker	BWW	100.00
2515	164	8–15–24	8–16–24	C. G. Payne	BWW	41.67
2536	171	8–15–24	8–23–24	Jos. L. Peterson	BWHOL	4.00
2543	172	8–15–24	8–22–24	L. H. Brewer	BWW	1.25
2471	173	7–15–24	8–26–24	Harvey Smiston	BWHOL	2.00
2542	182	8–15–24	8–29–24	A. B. Porter	BWHOL	2.00
2538	184	8–15–24	8–30–24	R. L. Ison	BWHOL	4.00
2532	185	8–15–24	8–30–24	J. O. Freeman	BWHOL	7.50
2529	186	8–15–24	8–30–24	D. W. Easley	BWHOL	41.67
2544	187	8–30–24	8–30–24	J. E. Crosby	BWHOL	62.50
2546	194	8–30–24	9– 3–24	L. C. Henning	BWW	75.00
2555	195	8–30–24	9– 3–24	J. E. Walker	BWW	100.00
2550	196	8–30–24	9– 4–24	C. G. Payne	BWW	41.67
2557	197	8–30–24	9– 4–24	Thorwald Larson	BWW	83.34
2553	199	8–30–24	9– 4–24	O. C. Williams	BWHOL	75.00
2552	200	8–30–24	9– 4–24	L. D. Divelbess	BWHOL	125.00

Wnt.	Treas.	Date Issued	Date Registered	Issued to	Held by	Amount
2567	201	8–30–24	9– 4–24	D. W. Easley	BWHOL	41.67
2566	202	8–30–24	9– 5–24	Sam Proctor	BWW	41.67
2564	203	8–30–24	9– 5–24	J. W. Bazell	BWW	25.00
2565	206	8–30–24	9– 7–24	J. O. Freeman	BWHOL	7.50
2572	207	8–30–24	9– 7–24	Jno. L. Fish	BWHOL	4.00
2554	208	8–30–24	9– 9–24	Geo. Woolford	BWHOL	37.50
2568	209	8–30–24	9– 9–24	Willard Whipple	BWHOL	5.00
2504	210	7–31–24	9– 9–24	N. A. Petersen	BWHOL	4.00
2539	211	8–15–24	9– 9–24	N. A. Petersen	BWHOL	4.00
2578	212	8–30–24	9– 9–24	L. H. Brewer	BWW	1.25
2511	213	8–30–24	9–11–24	Jos. L. Petersen	BWHOL	4.00
2574	214	8–30–24	9–11–24	N. A. Petersen	BWHOL	4.00
2575	215	8–30–24	9–11–24	Harvey Ballard	BWHOL	3.50
2577	217	8–30–24	9–16–24	A. B. Porter	BWW	2.00
2578	223	9–15–25	9–16–24	J. E. Crosby	BWHOL	62.50
2597	224	9–15–24	9–16–24	G. T. West	BWHOL	125.00
2588	225	9–15–24	9–16–24	O. C. Williams	BWHOL	75.00

Wnt.	Treas.	Date Issued	Date Registered	Issued to	Held by	Amount
2590	228	9–15–24	9–17–24	J. E. Walker	BWW	100.00
2586	229	9–15–24	9–17–24	C. G. Payne	BWW	41.67
2599	231	9–15–24	9–17–24	D. W. Easley	BWHOL	41.67
2592	232	9–15–24	9–17–24	Thorwald Larson	BWHOL	83.34
2587	233	9–15–24	9–17–24	L. D. Divelbess	BWHOL	125.00
2581	234	9–15–24	9–18–24	L. C. Henning	BWW	75.00
2528	237	8–15–24	9–19–24	Sam W. Proctor	BWW	41.67
2592	238	9–15–24	9–19–24	Sam W. Proctor	BWW	41.67
2596	240	9–15–24	9–19–24	Fred Williams	BWHOL	30.00
2610	241	9–15–24	9–19–24	Harvey Ballard	BWHOL	3.50
2606	242	9–15–24	9–24–24	Jos. L. Petersen	BWHOL	4.00
2609	243	9–15–24	9–24–24	N. A. Petersen	BWHOL	4.00
2607	244	9–15–24	9–25–24	J. L. Fish	BWHOL	4.00
2563	246	8–30–24	9–27–24	L. F. McClanahan	BWHOL	32.50
2622	247	9–30–24	10– 1–24	O. C. Williams	BWHOL	75.00
2624	249	9–30–24	10– 2–24	J. E. Walker	BWW	100.00

Wnt.	Treas.	Date Issued	Date Registered	Issued to	Held by	Amount
2621	252	9–30–24	10– 2–24	L. D. Divelbess	BWHOL	125.00
2616	253	9–30–24	10– 3–24	L. C. Henning	BWW	75.00
2641	256	9–30–24	10– 3–24	Jno. L. Fish	BWHOL	8.00
2630	257	9–30–24	10– 3–24	Fred Williams	BWHOL	30.00
2623	261	9–30–24	10– 4–24	Geo. Woolford	BWHOL	37.50
2614	262	9–30–24	10– 4–24	J. E. Crosby	BWHOL	62.50
2644	263	9–30–24	10– 4–24	Harvey Ballard	BWHOL	3.50

BWW—Bank of Winslow, Winslow, Arizona.
M&SGB—Merchants & Stock Growers Bank, Holbrook, Arizona.
BWHOL—Bank of Winslow, Holbrook Branch, Holbrook, Arizona.

PLAINTIFF'S EXHIBIT No. 161.

Marked for Identification Only. Case No. E.-93, Prescott. Admitted and Filed January 7, 1926.

WARRANTS ISSUED BY COUNTY SUPERINTENDENT OF SCHOOLS NAVAJO COUNTY, ARIZONA, ON SCHOOL FUNDS

Registered October 4, 1923, to October 4, 1924.

Unpaid May 25, 1925

SD	Wnt. No.	Tres. No.	Date Issued	Date Reg.	Issued to	Held By	Amount
1	157	3	10- 2-22	10- 3-22	Bank of Winslow	BWW (Pd)	$ 281.23
1	151	4	9-30-22	10- 3-22	Bank of Winslow	BWW (Pd)	1,015.06
1	158	5	10- 2-22	10- 3-22	Bank of Winslow	BWW (Pd)	660.50
3	1107	128	4- 9-24	4-13-24	M. & S. G. Bank	M&SGB	510.82
HI	1131	129	4-12-24	4-15-24	Bank of Winslow	BWW	300.00
1	1130	130	4-12-24	4-15-24	Bank of Winslow	BWW	801.47
3	5	132	7-14-24	7-16-24	Bank of Winslow	M&SGB	25.00

SD	Wnt. No.	Tres. No.	Date Issued	Date Reg.	Issued to	Held By	Amount
1	10	133	7–15–24	7–17–24	Bank of Winslow	BWW	50.16
G	3	134	7–14–24	7–17–24	Holbrook Tribune	M&SGB	17.30
1	2	135	7–14–24	7–17–24	Western Union Tel. Co.	M&SGB	.60
1	1	136	7–14–24	7–17–24	Winslow Mail	BWW	4.75
1	12	137	7–22–24	7–25–24	Bank of Winslow	BWW	179.25
1	20	138	7–22–24	7–25–24	Bank of Winslow	BWW	142.36
G	206	139	7–22–24	7–24–24	Bank of Winslow	BWW	75.00
G	7	145	8– 1–24	8– 3–24	Kate Kinney	M&SGB	75.00
1	31	146	8– 6–24	8– 8–24	Bank of Winslow	BWW	150.00
5	41	148	8–13–24	8–16–24	M. & S. G. Bank	M&SGB	6.87
UH	42	149	8–13–24	8–16–24	M. & S. G. Bank	M&SGB	225.00
R	151	150	6–30–24	8–18–24	Bank of Wins. Holbrook	BWW	90.00
G	11	151	8–16–24	8–18–24	Kate V. Kinney	BWW	75.00
G	150	152	6–30–24	8–18–24	Bank of Wins. Holbrook	BWW	76.72
3	44	156	8–20–24	8–22–24	Bank of Wins. Holbrook	BWHOL	829.00
5	2	157	8–20–24	8–22–24	Bank of Wins. Holbrook	BWHOL	208.33
5	28	158	8– 2–24	8–23–24	Public School Pub. Co.	BWHOL	36.09

SD	Wnt. No.	Tres. No.	Date Issued	Date Reg.	Issued to	Held by	Amount
10	52	159	8–20–24	8–23–24	Bank of Wins. Holbrook	BWHOL	18.00
5	51	160	8–20–24	8–23–24	First National Bank	BWW	10.00
10	48	161	8–20–24	8–23–24	First National Bank	BWW	9:50
2	55	166	8–25–24	8–30–24	Bank of Wins. Holbrook	BWHOL	47.30
G	15	170	9– 3–24	9– 4–24	Bank of Wins. Holbrook	BWHOL	75.00
UH	60	172	9– 4–24	9– 7–24	Bank of Wins. Holbrook	BWHOL	10.00
1	61	173	9– 6–24	9– 9–24	Bank of Winslow	BWW	366.66
10	63	174	9– 6–24	9–11–24	Cooley Lumber Co.	BWHOL	86.26
G	16	175	9– 6–24	9–11–24	Holbrook Tribune	BWHOL	8.00
G	18	176	9– 6–24	9–12–24	Navajo-Apache Tel. Co.	BWHOL	9.60
G	19	177	9– 6–24	9–12–24	Western Union Tel. Co.	BWHOL	.72
3	64	178	9–16–24	9–15–24	D. G. Younkin	BWHOL	250.00
1	71	179	9–13–24	9–16–24	Bank of Winslow	BWW	280.00
1	73	180	9–13–24	9–16–24	Bank of Winslow	BWW	25.80
UH	67	183	9–13–24	9–16–24	Bank of Wins. Holbrook	BWHOL	97.10
10	68	184	9–13–24	9–16–24	Bank of Wins. Holbrook	BWHOL	91.05
G	20	185	9–15–24	9–16–24	Bank of Wins. Holbrook	BWHOL	75.00

SD	Wnt. No.	Tres. No.	Date Issued	Date Reg.	Issued to	Held by	Amount
1	79	186	9–16–24	9–18–24	Bank of Winslow	BWW	177.23
1	82	187	9–16–24	9–18–24	Bank of Winslow	BWW	15.00
3	86	191	9–10–24	9–19–24	Bank of Wins. Holbrook	BWHOL	150.00
1	96	165	9–20–24	9–23–24	Bank of Winslow	BWW	43.50
1	103	198	9–21–24	9–29–24	C. T. Hansen	BWHOL	150.00
7	138	204	9–30–24	10– 2–24	Bank of Wins. Holbrook	BWHOL	140.00
16	137	205	9–30–24	10– 2–24	Bank of Wins. Holbrook	BWHOL	4.70
3	120	206	9–29–24	10– 2–24	Bank of Wins. Holbrook	BWHOL	345.00
1	122	207	9–29–24	10– 2–24	Bank of Wins. Holbrook	BWHOL	9.52
1	127	208	9–29–24	10– 3–24	Bank of Winslow	BWW	2,102.32
1	128	209	9–30–24	10– 3–24	Bank of Winslow	BWW	154.80
1	4	210	9–30–24	10– 3–24	Bank of Winslow	BWW	165.00
1	132	211	9–30–24	10– 3–24	Bank of Winslow	BWW	120.00

Total $10,872.57

BWW —Bank of Winslow, Winslow, Arizona.
M&SGB —Merchants & Stock Growers Bank, Holbrook, Arizona.
BWHOL—Bank of Winslow, Holbrook Branch, Holbrook, Arizona.

PLAINTIFF'S EXHIBIT No. 162.

Marked for Identification only. Case No. E-93, Prescott.
Admitted and Filed January 7, 1926.

WARRANTS ISSUED BY NAVAJO COUNTY, ARIZONA, ON ROAD FUND
Registered October 4, 1923 to October 4, 1924
Unpaid May 25, 1925.

Wnt. No.	Treas. No.	Date Issued	Date Registered	Issued to	Held by	Amount
826	128	10– 6–23	10–19–23	Standard Lbr. Mills	Ariz. St.	$ 46.10
1162	183	3–13–24	3–18–24	Ray Cummins	BWW	29.00
1203	196	4–12–24	4–15–24	Ray Cummins	BWW	36.00
1329	208	6–30–24	7–17–24	E. T. Hatch	M&SGB	28.00
1370	209	7–15–24	7–17–24	L. Owens	M&SGB	75.00
1340	210	6–30–24	7–12–24	J. T. Flake	M&SGB	42.00
1361	211	6–30–24	7–12–24	Riley Freeman	M&SGB	24.00
1357	212	6–30–24	7–10–24	Elios Smith	M&SGB	77.00
1329	213	6–30–24	7–10–24	W. Turley	M&SGB	13.50

Wnt. No.	Treas. No.	Date Issued	Date Registered	Issued to	Held by	Amount
1328	214	6–30–24	7–10–24	A. Hatch	M&SGB	4.00
1328	215	6–30–24	7–10–24	J. W. Pearce	M&SGB	18.38
1344	216	6–30–24	7–18–24	Standard Oil Co.	BWW	76.95
1367	217	7– 7–24	7–12–24	Navajo Garage	BWW	41.20
1366	218	7– 7–24	7–20–24	J. H. Lionberger	BWW	9.00
1318	219	6–30–24	7–20–24	Bert Bowler	BWW	24.00
1376	220	8– 4–24	8– 7–24	C. H. Turley	M&SGB	16.00
1375	223	8– 4–24	8– 6–24	L. B. Owens	M&SGB	75.00
1374	224	8– 4–24	8– 6–24	H. W. Despain	M&SGB	98.00
1379	226	8– 4–24	8– 8–24	Wm. Dagg Merc. Co.	BWW	70.40
1386	227	8– 4–24	8– 8–24	Carduff Transfer Co.	BWW	63.00
1390	230	8– 4–24	8–12–24	Cooley Lumber Co.	M&SGB	251.80
1387	231	8– 4–24	8– 9–24	J. H. Lionberger	M&SGB	20.00
1389	232	8– 4–24	8– 9–24	Jennings Auto Co.	M&SGB	11.32
1396	237	8–30–24	8–30–24	L. B. Owens	BWHOL	75.00
1399	239	9– 3–24	9– 4–24	S. P. Fish	BWHOL	23.80
4121	240	9– 3–24	9– 9–24	Chas. H. Turley	BWHOL	28.00

Wnt. No.	Treas. No.	Date Issued	Date Registered	Issued to	Held by	Amount
1410	245	9- 3-24	9- 9-24	Old Trails Garage	BWW	1.50
1400	246	9- 3-24	9-11-24	Union Oil Co.	BWHOL	97.37
1401	247	9- 3-24	9-11-24	Standard Oil Co.	BWHOL	54.03
1424	248	9- 3-24	9-12-24	Wayne Webb	BWHOL	51.00
1419	250	9- 3-24	9-13-24	Wayne Larson	BWHOL	25.00
1402	251	9- 3-21	9-13-24	John T. Flake	BWHOL	27.00
1414	252	9- 3-24	9-13-24	John T. Flake	BWHOL	28.00
1412	255	9- 3-24	9-15-24	J. W. Nickolaus	BWHOL	45.00
1423	256	9- 3-24	9-16-24	E. J. Larson	BWW	8.00
1416	259	9- 3-24	9-17-24	C. L. Rhoton	BWHOL	4.00
1429	260	9-15-24	9-17-24	F. B. Gardner	BWHOL	75.00
1428	261	9-15-24	9-17-24	L. B. Owens	BWHOL	75.00
1417	264	9- 3-24	9-29-24	L. E. Johnson	BWHOL	19.25
1431	265	9-30-24	10- 2-24	L. B. Owens	BWHOL	75.00
Total						$1,861.60

Ariz. St.—Arizona State Bank, Winslow, Arizona.
BWW —Bank of Winslow, Winslow, Arizona.
M&SGB —Merchants & Stock Growers Bank, Holbrook, Arizona.
BWHOL—Bank of Winslow, Holbrook Branch, Holbrook, Arizona.

Settled and approved as statement of the evidence this 16th day of Sept., 1926.

F. C. JACOBS,
Judge.

O. K.—E. M. W.

Regular October, 1925, Term—At Phoenix.

(Minute Entry of February 12, 1926.)

Hon. F. C. JACOBS.

United States District Judge, Presiding.

(Court and Cause.) No. E.—Prescott.

ORDER FOR DECREE.

The Court renders a decree in favor of complainant allowing a set-off of the amount of General School Warrants $6,313.38. Salary Fund Warrants $2,311.04; Road Fund Warrants in the sum of $792.-95; making a total of $9,417.37, together with interest from the date of the closing of the Bank of Winslow; that the improvement bonds of the Town of Winslow in the sum of $7,000.00 par value be returned by the defendant Hammons to the County Treasurer of Navajo County; that the amount thereof be set off in favor of the plaintiff; making a total set-off of $16,417.37;

A decree in favor of Apache County and against the complainant as to the Navajo County warrants pledged to Apache County prior to the 4th day of October, 1924.

A decree in favor of intervening petitioner George Jarvis, Treasurer and *Ex-officio* Tax Collector of Apache County, and the intervening petitioners Benjamin Brown, Jr., the National Surety Company and Fidelity and Deposit Company of Maryland for the relief prayed for in their respective intervening petitions to the extent that the said George Jarvis, Treasurer of Apache County,

shall retain possession of the registered warrants pledged to it; to apply the same in the manner provided and permitted by the nature and character of the pledge and by the law of Arizona;

That the restraining order heretofore entered be dissolved.

Dated this 12th day of February, 1926.

Thereupon, it is ordered by the Court that exceptions to the findings of the Court be entered on behalf of all the parties to the action.

O. K.—E. M. W.

In the District Court of the United States for the District of Arizona.

No. 93—EQUITY.

MARYLAND CASUALTY COMPANY, a Corporation,

Complainant,

vs.

A. T. HAMMONS, Superintendent of Banks of the State of Arizona; J. S. DODSON, Special Deputy Superintendent of Banks of Arizona; GEORGE J. SHAEFFER, Treasurer and *Ex-officio* Tax Collector of Navajo County, a Corporation,

Defendants,

GEORGE JARVIS, Treasurer and *Ex-officio* Tax Collector in and for the County of Apache, State of Arizona; BENJAMIN BROWN, Jr.; THE NATIONAL SURETY COM-

PANY, a Corporation; and FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation,

Intervenors.

DECREE.

This cause came on to be heard at this term of the above-named court, and was submitted to the court upon the pleadings and upon the evidence introduced by the respective parties, and the argument of counsel for the several parties thereto had, and now the Court having duly considered the evidence and arguments, and being fully advised in the premises, it is ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the amount of the indebtedness of the Bank of Winslow to the defendant Navajo County, after applying all payments and liquidations properly applicable to this indebtedness, is the sum of Thirty-seven Thousand Seven Hundred Fifty-two and 44/100 Dollars ($37,752.44).

2. That the complainant, Maryland Casualty Company, as surety upon the bond given by said Bank of Winslow, is entitled to have set off against the said indebtedness of the Bank of Winslow to Navajo County, to wit:

General School and District School warrants and Manual Training School warrants,	$6313.38
Salary Fund warrants aggregating,	2311.04
Road Fund warrant aggregating,	792.95
Making a total of	$9417.37

with all interest accruing thereon to the 4th day of October 1924, and that the said defendant A. T. Hammons, as State Superintendent of Banks, and successor of the Bank of Winslow and in possession of its assets, do return said warrants to the defendant George J. Schaeffer, County Treasurer and *Ex-officio* Tax Collector of Navajo County, who shall accept the said warrants and credit the amount thereof, plus the interest as aforesaid, upon the indebtedness, to wit: the said sum of $37,752.44, from the said Bank of Winslow to Navajo County.

3. That the balance of the indebtedness from said Bank of Winslow to said County of Navajo equals the sum of $37,752.44, less the principal of the said Navajo warrants, with interest thereon to the 4th day of October, 1924.

4. That the said defendant A. T. Hammons, Superintendent of Banks of the State of Arizona, shall return and deliver to the said defendant George J. Schaeffer, County Treasurer and *Ex-officio* Tax Collector of the County of Navajo, and Navajo County, the improvement bonds of the Town of Winslow in the par value of the sum of $7000, together with all unpaid interest coupons thereon and all interest, if any, accrued thereon since the delivery of the said bonds by the defendant Schaeffer to the said defendant Hammons, or the defendant Dodson, and upon the payment of the balance due after the offset of $9417.37, and interest has been made as hereinbefore provided, to the defendant Navajo County, by the complainant, the said defendant Schaeffer County Treasurer aforesaid, shall

return and deliver the said bonds to the complainant.

5. That the complainant herein shall pay to the defendant George J. Schaffer, County Treasurer and *Ex-officio* Tax Collector of Navajo County, the balance due after such offset has been made as hereinbefore provided, and upon payment of such balance shall receive from said defendant George J. Schaeffer County Treasurer and *Ex-officio* Tax Collector of Navajo County, the said Town of Winslow Improvement Bonds in the par value of seven thousand Dollars ($7000), together with all unpaid interest coupons thereon, and any interest that may have been collected thereon since the turning over of said bonds by the defendant Schaeffer to the defendant Hammons or the defendant Dodson, and thereafter the complainant shall be fully discharged of any liability to the said County of Navajo under or by virtue of its bonds set forth in the first amended bill of complaint herein.

6. That the complainant Maryland Casualty Company, a corporation, is entitled to be subrogated to the rights of said County of Navajo, and the defendant George J. Schaeffer, Treasurer and *Ex-officio* Tax Collector of said County of Navajo as a gneral creditor of said Bank of Winslow to the extent of the amount so paid by it to the said defendant Schaeffer as aforesaid, and all dividends and payments made and to be made by the defendant A. T. Hammons as Superintendent of Banks of the State of Arizona, or the defendant Dodson, as Deputy Superintendent of Banks of the State of Arizona, or his successor in such position, out of

the assets and property of said Bank of Winslow to the same extent as other general creditors of said Bank of Winslow, and that upon payment by the complainant to the defendant Schaeffer of the amount herein decreed to be paid by it to the said defendant George J. Schaeffer, County Treasurer and *Ex-officio* Tax Collector of the County of Navajo, aforesaid, the said last mentioned amount is hereby declared, adjudged and decreed to be a just and valid claim of the complainant against the said Bank of Winslow, and for the purpose of carrying into effect the subrogation hereby decreed, the said complainant is hereby adjudged and decreed to be a general creditor of said Bank of Winslow to the extent of the amount last above mentioned, and entitled to all the rights, dividends and payments heretofore made or to be made to other general creditors of said Bank of Winslow, and that such claim have the status of and be in all respects established as a duly allowed claim against said Bank of Winslow in the sum last aforesaid, and that the defendant A. T. Hammons, as Superintendent of Banks of the State of Arizona in charge of the liquidation of said Bank of Winslow, be, and is hereby directed to pay or cause to be paid to the complainant Maryland Casualty Company, the same dividends as have been paid or may hereafter be paid to the general creditors of said Bank of Winslow whose claims have been duly approved and allowed so as to place the said complainant Maryland Casualty Company upon the same footing and in the same position as other general creditors of said Bank of Winslow.

7. That the pledge of Navajo County warrants to Apache County, State of Arizona, and the Treasurer of said County, be and the same is hereby adjudged to be a valid and lawful pledge and that as against the intervenors George Jarvis, Treasurer and *Ex-officio* Tax Collector of Apache County, State of Arizona, Apache County, Benjamin Brown, Jr., the National Surety Company, a corporation, and the Fidelity and Deposit Company of Maryland, a corporation, the bill of complaint and the first amended bill of complaint be, and the same are hereby dismissed, and that the restraining order heretofore issued, so far as the same relates to the warrants so pledged by the said Bank of Winslow to and with the Treasurer of said Apache County, be and the same is hereby dissolved and discharged and said George Jarvis, Treasurer and *Ex-officio* Tax Collector of Apache County, State of Arizona, is hereby directed to present said Navajo County Warrants to George J. Schaeffer, Treasurer and *ex-officio* Tax Collector of Navajo County, Arizona, and upon payment of said warrants, said George Jarvis, Treasurer and *Ex-officio* Tax Collector of Apache County, Arizona, is hereby directed to apply the amount so received upon the reduction of the indebtedness of The Bank of Winslow to Apache County, arising out of public moneys of Apache County in the hands of the said The Bank of Winslow October 4th, 1924.

8. That the complainant do have and recover of and from the defendants A. T. Hammons, Su-

perintendent of Banks of the State of Arizona, J. S. Dodson, as Special Deputy Superintendent of Banks of the State of Arizona, George J. Schaeffer, Treasurer and *Ex-officio* Tax Collector of Navajo County, and Navajo County, a corporation, its costs herein incurred and taxed at the sum of $182.00, with all rights given by the laws of the State of Arizona for the collection thereof.

9. That intervenors George Jarvis, Treasurer and *Ex-officio* Tax Collector of Apache County, State of Arizona, Benj. Brown, Jr., National Surety Company and Fidelity & Deposit Company of Maryland do have and recover of and from complainant Maryland Casualty Company, severally and respectively, costs in this suit taxed respectively as follows:

George Jarvis, Treasurer and *Ex-officio* Tax Collector of Apache County, Arizona ...$7.00

Benj. Brown, Jr., National Surety Company and Fidelity & Deposit Company of Maryland $7.00

That intervenors do have execution therefor.

Done in open court this 19th day of April, 1926.

F. C. JACOBS,

United States District Judge for the District of Arizona.

O. K.—M. R. M.

[Endorsed]: Filed Apr. 19, 1926.

PETITION FOR ALLOWANCE OF AN APPEAL TO CIRCUIT COURT OF APPEALS AND ASSIGNMENTS OF ERROR.

Each of the above-named defendants, A. T. Hammons, Superintendent of Banks of the State of Arizona and J. S. Dodson, Special Deputy Superintendent of Banks of Arizona, believing themselves aggrieved by the final decree in the above-entitled cause, hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that a transcript of such part of the record as the parties to this cause shall by praecipe duly indicate, together with the exhibits and evidence herein stated in simple and condensed narrative form, so far as it relates to any of the claims on which error is predicated on any matter indicated by the defendants and also the decree herein rendered, all duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had which may be proper in the premises; and that a transcript of the record of this court, and of such part or abstract of the proofs as the rules of said court of appeals may require, and such assignments of error, briefs, and arguments may be caused to be printed and submitted to said court by the appellants as required by the Act of Congress of date February 13, 1911, as under Rule 23 of said Circuit Court of Appeals, is permitted and under

rules of court thereto applicable; hereby appealing from such portions of said decree and judgment as grants to the above-named plaintiff relief as against these appealing defendants and not hereby intending to appeal for any relief in said judgment and decree granted to the interveners in said cause.

And the defendants, A. T. Hammons, Superintendent of Banks of the State of Arizona, J. S. Dodson, Special Deputy Superintendent of Banks of Arizona, hereby assign the errors asserted and intended to be urged as follows:

DEFENDANT'S ASSIGNMENTS OF ERROR.

ASSIGNMENT OF ERROR No. I.

The Court erred in overruling the motion of these defendants that the complaint and action be dismissed upon the grounds in that motion stated as follows:

> "That this Court has no jurisdiction of the matters set out in said bill in that all of the said matters are involved in a proceeding entitled: "In the matter of the liquidation of the Bank of Winslow, Winslow, Arizona, having branch offices at Holbrook, Arizona, and St. Johns, Arizona, File No. 1865 in the Superior Court of the State of Arizona, in and for the County of Navajo, being a court of competent jurisdiction over the said defendant as *ex-officio* receiver of the Bank of Winslow, an insolvent banking corporation, pursuant to the laws of the State of Arizona, and the said

> defendants are acting under the orders of said Superior Court of Navajo County, Arizona, and the property and matters referred in said Amended Bill of Complaint are a part of the *corpus* of the Estate of the Bank of Winslow, under supervision of the last-named court";

it appearing from the allegations of Paragraph 3 of the Bill of Complaint that on October 4th, 1924, prior to the filing of any Bill in this case that the defendants in their official capacity took over the Bank of Winslow, then insolvent, and took charge thereof and its property and assets for the purpose of liquidation, under the laws of the State of Arizona, and that defendants had reported to the Superior Court in said matter as shown by Paragraph 5 of the Bill of Complaint; and these defendants acting in their official capacities had prior to the filing of the Bill of Complaint, in the process of a liquidation of the affairs of the Bank of Winslow, had adjusted with the County of Navajo, and its treasurer, certain portions of the indebtedness of that bank to said county, which settlement included a payment of certain county warrants, and a surrender of $7,000.00 of Town of Winslow Improvement Bonds, by the County and its Treasurer to these defendants, all as appears in Paragraph 7 of the First Amended Bill; and it also appearing from the face of the whole of the original Bill; and the First Amended Bill, that all of the particular assets of the Bank of Winslow as to which the plaintiff therein demanded relief as against these defendants were assets in the

possession of these defendants were assets involved in a liquidation of the affairs of the Bank of Winslow by these defendants, commenced as above and continued up to filing of Bill in this cause, and thus as and from the face of the Bill, it appears that the entire subject matter of said Bill, the assets as to which relief is sought, and as to the plaintiff and these defendants, are subject matters, assets and parties, which were each and all within the jurisdiction of the aforesaid state court at the time the bill was filed, and for reason thereof, defendants' motion to dismiss this case should have been granted by the District Court.

ASSIGNMENT OF ERROR No. II.

Under the provisions of Section 44, Chapter 31 of Session Laws of Arizona, of 1922, the assets and property of an insolvent bank when taken in charge by the Superintendent of Banks, become assets and property as to which the Superintendent of Banks is forthwith vested at law and in equity with the sole, exclusive and unconditional ownership and title, subject only to such equities in favor of third persons which have arisen or been obtained prior to the taking charge thereof by the Superintendent of Banks. And under the specific provisions of Section 46 of above Chapter 31, which reads as follows:

> "When the affairs of any bank have come into the hands of the Superintendent of Banks for liquidation the relations between the Superior Court and the Superintendent of

> Banks shall be the same as the relations of the Superior Court and the laws now existing, and the Superior Court shall have the same authority and jurisdiction over the Superintendent of Banks in such matters as it would over receivers appointed by the court, unless in this act *other* provided."

the Superior Court of the State of Arizona in and for Navajo County on the 4th day of October, 1924, was vested by law with full, and exclusive jurisdiction as to all matters pertaining to the liquidation of the affairs of the insolvent Bank of Winslow, and under the facts as alleged in the Bill of Complaint herein (particularly as stated in Assignment of Error No. 1, for brevity not repeated), the facts as to such jurisdiction so exclusively vested in the State Court, the District Court erred in entertaining the plaintiff's Bill, and erred in refusing to dismiss same for want of jurisdiction upon the motions of defendants that the same be dismissed for lack of jurisdiction.

ASSIGNMENT OF ERROR No. III.

Without regard to the questions of jurisdiction as presented in Assignment of Error Nos 1 and II, the Court erred for the reason that plaintiff wholly failed to allege, and wholly failed to show by its proofs, that it had at any time presented its alleged claim by filing same with the defendant Superintendent of Banks, as required by Section 48 of Chapter 31, Session Laws of Arizona, 1922, a provision and requirement in the state law

which makes such a presentation and rejection by the Superintendent of Banks, a condition precedent to the right of any claimant to resort to any court at all, for relief as against the rejection by the Superintendent of Banks of a just claim, overruling the first reason of defendants as stated in defendants' Motion to Dismiss, that the bill failed to state a cause for equitable relief to plaintiff, and entering a decree regardless of said motion and reason.

ASSIGNMENT OF ERROR No. IV.

The Legislature of the State of Arizona, in paragraph 2462, Revised Statutes of Arizona, 1913 Civil Code, when it specially provided as follows:

> "All warrants issued by the board of supervisors of any county shall be receivable in payment of all debts to such county, and all taxes assessed against property in such county. Upon the tender of any such warrant in payment of any such debt or tax, the county treasurer shall, if the warrant be less than the amount of such debt or tax, and be accompanied by a sufficient sum of money to make up the full amount of such debt or tax, credit the amount of such warrant upon such debt or tax; if the amount of such warrant be greater than the amount of such debt or tax, he shall mark such debt or tax paid, and endorse the amount thereof upon the back of such warrant as a partial payment thereof, provided that only the person named as payee

in any such warrant shall be entitled to use the same in payment of such debt or tax."

therein and thereby covered the entire subject as to matters of set-off in favor of holders of warrants, and under the rule of "*Expressio unius est exclusio alterius*" as it should have been applied to the facts and matters of this cause, the District Court erred in decreeing the plaintiff was entitled to any set-off on account of any of the warrants in suit, there being an entire absence of evidence showing any right to such set-off under above statute.

ASSIGNMENT OF ERROR No. V.

Under the effect of the provisions of Paragraphs 2419 and 2420 of Revised Statutes of Arizona, 1913 Civil Code, which read as follows:

"The board of supervisors, shall, by resolution, create a fund to be known as the expense fund, and shall, by order to be entered in the minutes of the board, order, whenever and as often as necessary, the transfer of a sufficient amount of money into said expense fund from the general fund of such county to pay the expenses of maintaining the government of such county until additional revenues of such county may be collected with which to defray such expenses. Before making such orders the board shall make an estimate of the amount required, and for what purpose, and also the amount of money available, or that may be available for the purpose of such

fund, from taxes or otherwise, and when such estimate is made, shall enter the whole of such itemized estimate in the minutes of the board. It is hereby made the duty of the county treasurer of such county to make such transfer when so ordered by such board, and to honor and pay from such expense fund orders drawn thereon by the board of supervisors of such counties for the maintenance of the county government, such orders to be drawn and signed in the same manner as county warrants have been heretofore, and the board of supervisors shall in no case issue an order on such fund until there is sufficient money therein to pay and redeem the same. Orders shall be issued on said expense fund in the order of their allowance by said board; provided, however, that if at any time in the opinion of the board of supervisors there shall be more money in said expense fund than is necessary to pay the expenses of maintaining the government of such county, the board of supervisors thereof shall make an order directing the treasurer to transfer such excess to the general fund of the county, and the treasurer shall make such transfer so ordered, and the money so re-transferred shall be available for the redemption of outstanding warrants against the county, as now provided by law."

"The expense of maintaining the government of any county consists of official salaries, fees and mileage, fees and mileage of jurors

and witnesses, county printing and advertising, books and stationery, feeding county prisoners, the care of the indigent sick, water, wood, lights and like supplies for county institutions, insurance and necessary repairs of county buildings. But nothing herein contained shall authorize the payment of any money from such expense fund for the repair or building of any road or bridge; provided, further, that boards of supervisors may, in their discretion, create a salary fund for the purpose of paying therefrom, when due, salaries of officials and employees, and fees and mileage of jurors and after the transfer of funds to the expense fund, are hereby authorized to transfer from said expense fund to said salary fund, in manner provided for transfer of funds from the general fund to the expense fund, an amount sufficient to pay such salaries of officials and employees, and fees and mileage of jurors, and to authorize and order payments from such salary fund in like manner as on the expense fund, and may, in like manner, create and make payments from such other county funds as they may deem necessary for the proper transaction of business of the county."

Any amount standing to the credit of a so-called "SALARY FUND," is an amount specially set aside by order of the Board of Supervisors for the sole purpose of providing cash funds for actual payments of warrants as same are drawn upon that special fund and presented to the Treasurer

for payment therefrom, and until an order has been made by that Board for a re-transfer of actual balances in the salary fund to the general fund for the purpose of paying registered warrants, the County Treasurer is without authority to pay registered warrants from salary funds, and there being an entire absence of allegation in the Bill, and an entire absence of evidence at the hearing that any such retrasnferring order was ever made, the whole record of the case is without any evidence to support the decree of the District Court, that any of the registered warrants, by the decree adjudged as due and available as a set-off, were in fact so available, and in the absence of such evidence, the Court was in error in adjudging that registered warrants to the amount of $9,417.-37, were items to be properly allowed as a set-off in favor of plaintiff.

ASSIGNMENT OF ERROR No. VI.

The District Court was in error when it decreed that plaintiff was entitled to have set-off in its favor, General School, District School and manual training school warrants to the amount of $6,313.38, for the reasons that the record shows that no part of any public funds collected for any of above school purposes were included in any deposit made by the County Treasurer of Navajo County in the insolvent Bank of Winslow, and under the statute and constitutional laws of the State of Arizona, public revenues collected for school purposes are funds distinct from any revenues col-

lected for county purposes, and under those laws the County Treasurer is prohibited from using money collected for school purposes, for county purposes, or *vice versa,* and the decree of the District Court in its effect would require the County Treasurer of Navajo County to do an unlawful act, by compelling him to divert public money raised for one public purpose to another purpose, and that decree so far as it relates to above described "SCHOOL FUNDS" is not only contrary to the evidence of the case, but is also contrary to the law of the case to be applied to the facts of that record as shown by the undisputed evidence.

ASSIGNMENT OF ERROR No. VII.

That the testimony of witness George Schaefer, that the general county school fund had a credit to the amount of $10,079.00, which is the only evidence in the whole record upon which to base a conclusion that there were school funds sufficient to pay the $6,313.36 of school warrants by the District Court in its decree allowed as a set-off in favor of Plaintiff, and is wholly insufficient evidence to support the decree in that regard, for the reason that under the statute laws of the State of Arizona, the County Treasurer is without authority to pay any warrant drawn upon funds provided for any school district, until the County School Superintendent has made an order of distribution under which general collections of funds for school purposes, are distributed to the credit of particular school districts, and then and then only, the County Treasurer becomes authorized to

pay warrants drawn for the purposes of each such district, and to the extent of funds so distributed to each district. There being no evidence in the whole record that the $10,079.00 amount of general school funds had been ordered distributed to the districts, and there being no evidence that any district had funds to its credit sufficient to have paid such of the warrants drawn for its purposes as are included in the $6,313.38 of school warrants by the District Court allowed as a set-off, the decree in that respect is wholly erroneous, for the reason that it is not supported by the evidence, and is contrary to the law of the State of Arizona as that law should have been considered by the District Court and applied to the record of the case.

ASSIGNMENT OF ERROR No. VIII.

That the District Court erred in permitting evidence to be introduced as to the existence of funds in the county treasury for payment of any of the registered warrants referred to in the decree, and overruling the objections to such a line of evidence, in which objection it was urged that such evidence was outside the issues as framed by the pleadings, that it was alleged and admitted that all warrants in question were "registered warrants," and as such were not subject to payment until called by notice, and then payable only in the order of dates of registration, according to the statutes of Arizona, paragraphs 2440, 2568, 2569 and 2571 of Revised Statutes of Arizona, 1913 Civil Code, Paragraphs 2440 and 2571 reading as follows:

"Warrants drawn by order of the supervisors on the county treasurer for the current expenses during each year must specify the liability for which they are drawn, and when they accrued, and must be paid in the order of presentation to the treasurer. If the fund is insufficient to pay any warrant, it must be registered, and thereafter paid in the order of its registration." (Par. 2440.)

"Warrants drawn on the treasury and properly attested are entitled to preference as to payment out of moneys in the treasury properly applicable to such warrants according to the priority of time in which they were presented. The time of presenting such warrants must be noted by the treasurer, and upon receipt of moneys into the treasury not otherwise appropriated, he must set apart the same or so much thereof as is necessary for the payment of such warrants."

And there being no allegation in the Bill, to the effect that the County Treasurer of Navajo County had been derelict in duty, in failing to give a call for payment of registered warrants, under the requirements of above referred to provisions, the objections of defendants against the introduction of any evidence tending to show such a dereliction should have been sustained.

ASSIGNMENT OF ERROR No. IX.

That the District Court erred in overruling the motions of defendants that the testimony of County

Treasurer Schaefer be stricken for the reasons urged in support of such motion, that there was no evidence showing any money in the Bank of Winslow available at any time for the payment of any of school warrants, or the road warrants, or the salary warrants, as to which plaintiff claimed a set-off; that the testimony of said Schaefer did show the existence of other registered warrants, about $47,000.00 of so-called "expense fund warrants," a large amount of other so-called "salary warrants," and other school warrants, all issued and held by other parties than parties to this suit, and there being no evidence as to any call for payment, and no evidence of the existence of funds sufficient to pay all outstanding registered warrants, and no evidence establishing, under the statutes referred to and recited in Assignment of Error No. VIII, that the warrants held by the Bank of Winslow were entitled to priority of payment to the extent of any funds on hand, and which were reasons sufficient to require the District Court to sustain said motion to strike the testimony referred to therein, and with the motion sustained and granted as it should have been, there was no testimony whatever in the whole record, to support the decree of the court which allowed any set-off of any registered warrant at all in favor of plaintiff, and said decree was in consequence not supported by proper evidence, nor by sufficient evidence, and was rendered through error prejudicial to these defendants.

ASSIGNMENT OF ERROR No. X.

The entire record fails to disclose such a state of facts, as under the statutes of Arizona, which relate to and control the payment of registered warrants, would have permitted the Bank of Winslow to have applied any of the warrants held by it, in a reduction of the amount of county funds deposited with it, at the time the Superintendent of Banks took charge of the property and assets of said Bank of Winslow, and the District Court erred in entering its decree which permitted the application of $9,414.37 of registered warrants in favor of plaintiff, which as to the bank itself would not have been so applied. And the decree in that regard is not supported by the evidence, and is contrary to law and equity.

ASSIGNMENT OF ERROR No. XI.

For the reason that the District Court erred in overruling motions made in behalf of these defendants at the conclusion of the hearing, in which motions these defendants urged reasons for such an order of dismissal as appear in the preceding assignments of error, and which for reasons of brevity are not here again repeated, and were and are reasons fully supporting those motions for dismissal, and are again urged as reasons why the Bill should have been dismissed, and that the denial of such motions was error prejudicial to these defendants.

ASSIGNMENT OF ERROR No. XII.

That the statutes of the State of Arizona which

require the executing by a bank of a depository bond to secure deposits of county funds therein, are to the intended purpose and effect of preventing any question of any relation of creditor and debtor arising with respect to such deposits, and, to prevent in the event of an insolvency of a depositary bank, any question of priority of preference arising as between the county as to its deposits, and other general creditors, also depositors therein; that the District Court, in its decree erred in failing to apply the state laws to the above purpose and intended effect, and by directing a set-off to the amount of registered warrants held by the bank, in partial discharge of *plaintiff* liability as a surety, in fact and in effect created a preference in favor of plaintiff, and the decree in that regard is contrary to law and equity.

WHEREFORE, the defendants, A. T. Hammons, Superintendent of Banks of the State of Arizona; J. S. Dodson, Special Deputy Superintendent of Banks of Arizona, pray that the said final decree of the District Court of the United States for the District of Arizona, sustaining the plaintiff's bill may be reversed to the full extent, and to that extent only which said decree grants relief by set-off and otherwise as against these appealing defendants in favor of plaintiff, and that said court may be ordered to enter a decree in accordance with the prayers in said answer dismissing said bill or in such other form as to said Circuit Court of Appeals for the Ninth Circuit shall deem Just.

Dated this 25th day of June, A. D. 1926.

SIDNEY SAPP,
Holbrook, Arizona.
D. E. McLAUGHLIN,
Holbrook, Arizona.
JOHN W. MURPHY,
Attorney General.
WILL E. RYAN,
Special Counsel,
Phoenix, Arizona.

Solicitors for Defendants and Appellents.

Business Address: Phoenix, Arizona.

O. K.—E. M. W.

ORDER.

In the above-entitled cause and matter, the foregoing and annexed petition for appeal having been duly presented,

IT IS ORDERED: That the prayer of said petition, and said appeal is granted and allowed upon the giving of a bond in the sum of Eight Thousand ($8,000.00) Dollars, conditioned as required by law, and that upon the filing and approval of said bond, that citation on said appeal be duly issued directed to the appellee, and that other proceedings for perfecting said appeal may be had under the rules and practice of the Court.

Dated, June 26th, A. D. 1926.

F. C. JACOBS,
Judge.

O. K.—M.

(From the "Winslow Mail," August 1, 1924.)

NAVAJO COUNTY BUDGET

For the Fiscal Year Ending June 30, 1925.

Schedule No. 1.

GENERAL FUND.

	Adopted Budget Past Fiscal Year.	Actual Expenditures Past Year.	Estimated Present Year.
Assessor, Salary	$ 1,800.00	$ 1,800.00	$ 2,215.00
Chief Deputy, Salary	1,500.00	1,270.00	1,500.00
Office Supplies	750.00	1,071.81	750.00
Total	$ 4,050.00	$ 4,291.81	$ 4,465.00

	Adopted Budget Past Fiscal Year.	Actual Expenditures Past Year.	Estimated Present Year.
ATTORNEY'S OFFICE—			
Attorney, Salary	2,000.00	2,000.16	2,460.00
Deputy, Salary		225.00	
Stenographer	900.00	900.00	900.00
Office Supplies	900.00	985.36	900.00
Total	$ 3,800.00	$ 4,110.46	$ 4,260.00
BOARD OF SUPERVISORS—			
Chairman, Salary	1,200.00	1,200.00	1,290.00
Members, Salaries, (2)	2,000.00	2,000.00	2,185.00
Clerk, Salary	1,800.00	1,800.00	1,800.00
Printing, Stationery and Supplies	1,000.00	2,010.04	1,000.00
Publishing Minutes	500.00	381.57	500.00
Transportation Expense	500.00	873.67	500.00
Total	$ 7,150.00	$x8,264.84	$ 7,275.00

	Adopted Budget Past Fiscal Year.	Actual Expenditures Past Year.	Estimated Present Year.
COURT HOUSE AND PARK MAINTENANCE—			
Janitor, Salary	750.00	780.00	750.00
Repairs and Maintenance	1,000.00	1,073.62	500.00
Water	500.00	663.00	500.00
Fuel	400.00	411.45	400.00
Lights	300.00	454.13	300.00
Telephones and Telegrams	1,200.00	1,521.18	1,200.00
Supplies	1,000.00	876.22	500.00
Insurance	500.00	1,252.62	700.00
Total	$ 5,650.00	$ 7,032.22	$ 4,850.00
ELECTIONS—			
Registrations	250.00	225.10	800.00
Election Officers, per diem		215.13	2,500.00

	Adopted Budget Past Fiscal Year.	Actual Expenditures Past Year.	Estimated Present Year.
Printing and Supplies		1.50	1,200.00
Total	$ 250.00	$ 441.73	$ 4,500.00
HEALTH DEPARTMENT—			
Superintendent, Salary	600.00	650.00	600.00
Superintendent, Expense		260.90	
Indigent Supplies	2,400.00	2,723.92	2,400.00
Indigent Transportation	200.00	153.55	200.00
Indigent Burial	200.00	195.00	200.00
Quarantine Expense	750.00	3,883.05	700.00
County Hospital Supplies and Expense	50.00	185.35	50.00
Coroner's Expense	50.00	116.60	50.00
Examination of Insane	50.00	15.00	50.00
Reg. Vital Statistics	150.00	151.50	150.00
Total	$ 4,450.00	$ 8,334.97	$ 4,400.00

	Adopted Budget Past Fiscal Year.	Actual Expenditures Past Year.	Estimated Present Year.
JUSTICE COURTS—			
Justice Salaries	3,035.00	3,037.84	3,215.00
Constable Salary	1,712.00	1,282.50	1,785.00
Expenses	1,100.00	679.68	700.00
Total	$ 5,847.00	$ 5,000.02	$ 5,200.00
MISCELLANEOUS EXPENSES—			
Fair, county and state		339.10	350.00
Immigration Commissioner	150.00		
Farm Advisor	750.00	750.00	1,500.00
Miscellaneous	200.00	4,339.26	500.00
Total	$ 1,100.00	$ 5,428.36	$ 2,350.00
RECORDER'S OFFICE—			
Recorder's Salary	1,800.00	1,950. 00	2,215.00
Chief Deputy Salary	1,500.00	1,460.00	1,500.00

	Adopted Budget Past Fiscal Year.	Actual Expenditures Past Year.	Estimated Present Year.
Office Supplies	400.00	272.08	300.00
Total	$ 3,700.00	$ 3,682.08	$ 4,015.00
SHERIFF'S OFFICE—			
Sheriff's Salary	3,000.00	3,000.00	3,550.00
Chief Deputy Salary	1,800.00	1,800.00	1,800.00
Deputies (2) Salary	2,260.00	2,700.00	3,000.00
Traveling Expense	2,000.00	5,493.51	2,000.00
Prisoners' Meals	1,000.00	2,212.00	1,000.00
Office Supplies	300.00	2,055.85	400.00
Total	$ 10,360.00	$ 17,262.26	$ 11,750.00
SUPERIOR COURT—			
Judge Salary	1,500.00	1,500.00	1,500.00
Clerk, Salary	1,800.00	1,800.00	2,215.00
Chief Deputy, Salary	600.00	600.00	600.00

	Adopted Budget Past Fiscal Year.	Actual Expenditures Past Year.	Estimated Present Year.
Reporter's Salary	1,800.00	1,800.00	1,800.00
Jurors' Fees and Mileage	4,500.00	7,532.25	4,500.00
Office Supplies	300.00	230.77	300.00
Interpreters	100.00	107.50	100.00
Foreign Judges and Witnesses	400.00	548.50	400.00
Total	$ 11,000.00	$ 14,119.02	$ 11,415.00
TREASURER'S OFFICE—			
Treasurer's Salary	2,000.00	2,000.16	2,230.00
Chief Deputy, Salary	100.00	200.00	100.00
Office Supplies	400.00	144.47	150.00
Total	$ 2,500.00	$ 2,344.63	$ 2,480.00

Schedule No. 2.
ROAD FUND.

	Adopted Budget Past Fiscal Year.	Actual Expenditures Past Year.	Estimated Present Year.
ENGINEER'S OFFICE—			
Engineer's Salary	2,700.00	3,100.00	3,000.00
Office Expense and Supplies	1,000.00	250.00	250.00
Total	$ 3,700.00	$ 3,350.00	$ 3,250.00
ROADS AND BRIDGES—			
New Construction		7,472.13	
Maintenance	16,000.00	19,262.61	15,750.00
Equipment	1,000.00	894.83	1,000.00
Maintenance, Snowflake-Pinetop Project	3,000.00	3,031.94	3,000.00
Special levy, flood control		10,000.00	10,000.00
Total	$ 23,700.00	$ 44,011.51	$ 33,000.00

Schedule No. 3.

GENERAL COUNTY BONDS

PURPOSE OF EXPENDITURES—
COUNTY
ROAD BONDS—

	Adopted Budget Past Year.	Actual Exp. Past Fiscal Year.	Estimated Expend. Present Year.	Treasurer's Balance or Deficit, Bal. on Hand Ju. 1	Estimated Exp. Present Year After Consl. of Bal. and Def.
Interest	$ 23,832.00	$ 17,863.69	$ 20,150.00	$ 4,162.43	$ 19,437.00
Redemption	3,500.00		4,500.00	14,604.71	4,500.00
Total	$ 27,332.00	$ 17,863.69	$ 24,650.00	$ 18,767.14	$ 23,937.00

Schedule No. 15.

SCHOOL DISTRICT BONDS.

(Special District Levies.)

S. D. No. 1, H. 11–20–11, Int.....	$ 1,200	$1,050.00	$1,020	$ 20.00	$ 1,000
Red	1,500		1,500	6,562.67	1,500
S. D. No. 1, C, 10–1–10, Int.....	180	180.93	180	35.00	215
Red	500		3,000	990.00	3,000
S. D. No. 1, C, 7–3–16, Int.....	2,200	2,226.00	2,220	610.00	1,510
Red	2,000		7,000	9,114.23	7,000
S. D. No. 1, C, 4–1–20, Int.....	1,500	1,474.42	1,250	330.00	1,580
Red	1,500		500	2,772.12	500
S. D. No. 2, C, 4–5–15, Int.....	420	360.00	240	230.00	190
Red	1,011		1,000	1,133.69	1,000
S. D. No. 3, C, 9–1–15, Int.....	1,200	1,001.00	1,000	165.00	835
Red	1,500		2,000	3,620.00	2,000

S. D. No. 3, C, 2–5–17, Int.....	360	360.88	316	115.00	425
Red	1,300		500	1,716.00	500
S. D. No. 5, C, 5–18–18, Int.....	1,500	1,680	1,250	415.00	835
Red	2,000		800	3,507.29	800
S. D. No. 6, C, 1–15–23, Int.....	870	586.25	435		435
Red			500		500
S. D. No. 10, C, 5–16–18, Int.....	330	330.00	330	710.00	380
Red	800		500	596.00	500
S. D. No. 16, C, 11–1–16, Int.....	240	525.00	240	130.00	370
Red	800		500	788.00	500
Totals	$22,931	$9,774.48	$26,325	$33,560.00	$25,575

SCHEDULE No. 16.

Receipts from all other sources other than direct taxation.

GENERAL COUNTY FUND—

	Estimated Past Fiscal Year	Actual Past Fiscal Year	Est. Present Fiscal Year
Interest County Deposits	$ 1,500.00	$ 2,305.00	$ 2,000.00
Interest Delinquent Taxes	1,500.00	1,312.00	1,500.00
Justice Court Fees	300.00	551.00	500.00
Justice Court Fines	1,200.00	372.00	500.00
Licenses (Sheriff)	700.00	700.00	700.00
Recorder's Fees	2,500.00	2,935.00	2,500.00
Sheriff's Fees	600.00	953.00	900.00
Superior Court Fees	3,000.00	3,236.00	3,000.00
Superior Court Fines	1,200.00	2,253.00	2,000.00
U. S. Prisoners' Meals		307.00	
Constable Fees		57.00	
Total	$12,500.00	$14,981.00	$13,600.00

	Estimated Past Fiscal Year	Actual Past Fiscal Year	Est. Present Fiscal Year
GENERAL ROAD FUND—			
Forest Reserve Fund	$ 2,250.00	$ 2,255.00	$ 2,250.00
Gasoline Tax		9,878.00	10,000.00
Road Poll Tax	750.00	1,012.00	1,000.00
Miscellaneous Roads		1,578.00	1,500.00
Total	$ 3,000.00	$14,723.00	$14,750.00
GENERAL COUNTY SCHOOL FUND—			
Forest Reserve Fund	$ 2,250.00	$ 2,255.00	$ 2,250.00
School Poll Tax	3,500.00	4,037.00	3,500.00
State School Apportionment	62,410.00	50,173.00	50,000.00
Total	$68,160.00	$56,465.00	$55,750.00
GENERAL HIGH SCHOOL FUND—			
State Aid to High School	$ 6,500.00	$ 6,500.00	$ 7,000.00
Grand Total	$74,660.00	$62,965.00	$62,750.00

SCHEDULE No. 10, 11, 13 and 14.

S. D. No.	Av. Att. 6 Mos.	Total Last Year Budget, Plus Bal., etc.	Total Exp. Last Year Plus O. D.	Bal. or Def. Def. Starred	Est. Exp. 1924–1925	Gen. Levy	Special Dist. Levy
1	705	$59,598.00	$58,940.00	$ 657.86	$53,701.00	$49,350.00	$ 4,351.00
2	82	5,060.00	4,861.39	198.61	8,880.00	5,740.00	3,140.00
3	183	19,930.00	18,814.66	1,115.34	19,930.00	12,810.00	7,120.00
4	39	3,510.66	2,975.20	535.46	3,000.00	3,000.00	
5	200	22,908.19	19,915.30	2,992.82	18,000.00	14,000.00	
6	140	13,521.31	10,740.67	2,780.70	11,205.00	9,800.00	1,505.00
7	8	1,500.00	1,509.01	9.01*	1,500.00	1,500.00	
8	18	1,524.16	1,490.75	3,341.00	1,500.00	1,500.00	
9	90	3,475.16	2,917.04	558.12	3,000.00	3,000.00	
10	90	6,573.92	6,655.39	81.47*	6,400.00	6,300.00	4 100.00
11	48	3,001.50	3,475.29	424.29*	3,360.00	3,360.00	
12	16	1,500.00	1,289.90	210.10	1,500.00	1,500.00	
13	24	2,220.89	2,178.09	24.70	1,500.00	1,500.00	
14	13	1,511.43	1,502.25	9.18	1,500.00	1,500.00	

S. D. No.	Av. Att. 6 Mos.	Total Last Year Budget, Plus Bal., etc.	Total Exp. Last Year Plus O. D.	Bal. or Def. Def. Starred	Est. Exp. 1924–1925	Gen. Levy	Special Dist. Levy
15	12	1,679.07	1,411.05	268.02	1,500.00	1,500.00	
16	95	6,060.00	7,665.11	1,605.11	7,350.00	6,650.00	700.00
17	9	1,500.00	1,331.98	1,168.07	Discontinued		
18	15	1,796.50	1,476.20	320.30	1,500.00	1,500.00	
19	20	1,618.75	1,588.30	330.45	1,500.00	1,500.00	
20	24	1,811.94	1,666.81	145.13	1,500.00	1,500.00	
22	14	1,660.49	1,496.03	164.46	1,500.00	1,500.00	
23	21	1,814.87	1,723.86	91.01	1,500.00	1,500.00	
24	15	1,573.80	1,410.80	163.00	Discontinued		
25	13	1,500.00	1,414.62	85.28	1,500.00	1,500.00	
26	7	1,500.00	1,489.68	10.32	Discontinued		
HIGH SCHOOLS—							
1	97	27,411.00	18,719.87	8,294.13	21,145.00	6,790.00	6,061.00
3	57	11,835.00	11,131.28	703.72	12,000.00	3,390.00	7,907.00

S. D. No.	Av. Att. 6 Mos.	Total Last Year Budget, Plus Bal., etc.	Total Exp. Last Year Plus O. D.	Bal. or Def. Def. Starred	Est. Exp. 1924–1925	Gen. Levy	Special Dist. Levy
Union 130.				5,000.00	20,882.00	9,100.00	6,782.00
Total						151,290.00	37,566.00
Reserve						15,129.00	
						166,419.00	
GENERAL SCHOOL FUND.							
Salary				$1,800.00	$1,800.00	$1,800.00	$1,800.00
Office Help				400.00	400.00	400.00	400.00
Expense				1,000.00	1,000.00	1,000.00	1,000.00
School Levy Grand Total							169,619.00

SUMMARY OF EXPENDITURES AND AMOUNTS TO BE RAISED BY DIRECT TAXATION.

General County Requirements—

	Adopted Budget Past Fiscal Year	Actual Exp. for Past Year	Budget Present Year	Less Receipts Schedule No. 16	Est. Exp. to be Raised by Direct Tax.
Gen. Co. Fund.....	60,610.00	80,152.30	66,960.00	13,600.00	53,360.00
Gen. Road Fund.....	23,700.00	44,011.51	33,000.00	14,750.00	18,250.00
Gen. Co. Bonds.....	27,332.00	17,863.69	23,937.00		23,937.00
Gen. Sch. Fund.....	3,200.00	3,100.00	3,200.00		3,200.00
Gen. Com. School Maintenance	150,920.00	158,939.33	132,010.00	55,750.00	76,260.00
Gen. H. School Maintenance	11,396.00	29,351.15	19,280.00	7,000.00	12,280.00
Totl. Co. Req.....$277,158.00		$333,917.98	$278,387.00	$91,100.00	$187,287.00
Special District Levies—					
Common School Maintenance	13,797.61	Incl. above	16,816.00		16,816.00
High School Maintenance..	25,990.94	Incl. above	20,750.00		20,750.00
Total Req. All Purp.....$316,946.55		$333,917.98	$315,953.00	$91,100.00	$224,853.00

Schedule No. 19.

TEN PER CENT LIMIT CHECK ACTUAL LEVIES.

(Applies to General and Road Fund Only.)

	Actual Levies For Past Fiscal Year	Est. Exp. to be Raised by Direct Taxation for Present Fiscal Yr.
General Fund	$48,110.00	$53,360.00
Road Fund	20,700.00	18,250.00
Total	$68,810.00	$71,610.00
Add 10 per cent allowed by law	6,881.00	
Amount allowed by law	$75,691.00	$71,610.00

All taxpayers of Navajo County, Arizona, are hereby notified that the Board of Supervisors will meet at its office in Holbrook, Arizona, on the 18th day of August, 1924, at 10 o'clock A. M. for the purpose of making tax levies in accordance with the foregoing estimate as amended and finally adopted as hereafter provided.

All taxpayers of Navajo County, Arizona, are hereby further notified that said Board of Supervisors will hold a public hearing at its office in Holbrook, Arizona, on the 11th day of August, 1924, at 10 o'clock A. M., when and where any taxpayer of Navajo County will be heard in favor or against any of the proposed tax levies, after which hearing the foregoing estimates as modified will be adopted by the said Board of Supervisors

as a basis of taxation for fiscal year ending June 30, 1925.

C. E. OWENS,
Chairman Board of Supervisors.
WALLACE ELLSWORTH,
Clerk Board of Supervisors.
O. K.—M. R. M.

CITATION ON APPEAL.

United States of America.
The President of the United States to Maryland Casualty Company, a Corporation, Plaintiff and Appellee, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, on the 11th day of August, A. D. 1926, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Arizona, in cause No. 93–E. (Prescott), wherein A. T. Hammons, Superintendent of Banks of the State of Arizona, and J. S. Dodson, Special Deputy Superintendent of Banks of Arizona, are appellants, and you are appellee, to show cause, if any there be, why the said decree entered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS: The Honorable FRED C. JACOBS, Judge of the District Court of the United States for the District of Arizona, this 13th day of

July, in the year of our Lord one thousand nine hundred and twenty-six.

F. C. JACOBS,
United States District Judge for the District of Arizona.

Received this writ on the 15th day of July, 1926, at Tucson, Dist. of Ariz., and on the 15th day of July, 1926, at 11:50 A. M., I served the same by handing a true copy thereof with the endorsement thereon to the said Samuel L. Pattee, personally at Tucson, Arizona.

G. A. MAUK,
U. S. Marshal for the Dist. of Arizona.
By Tom Wills,
Deputy U. S. Marshal.

O. K.—M.

BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, A. T. Hammons, Superintendent of Banks of the State of Arizona, and J. S. Dodson, as Special Superintendent of Banks of Arizona, as principals, and the United States Fidelity and Guaranty Co. as surety, which surety is a corporation organized under the laws of the State of Maryland, and by its laws, and laws of the State of Arizona, is duly authorized and qualified to become surety upon appeal and other bonds in the State of Arizona, and upon this bond, and each held and firmly bound unto the Maryland Casualty Company, a corporation, in the sum of Eight Thousand Dollars ($8,000.00) lawful money of the

United States, to be paid to the said Maryland Casualty Company, its successors or assigns, to which payment well and truly to be made, we and each of us bind ourselves jointly and severally, and each of our successors and assigns firmly by these presents.

Sealed with our seals, executed and dated the 1st day of July, A. D. 1926.

WHEREAS, the above-named Maryland Casualty Company as plaintiff in a certain cause in equity, in which the above-named principals of this bond, and others, were defendants, and being a cause No. E.–93, Prescott, in the District Court of the United States for the District of Arizona, on the 19th day of April, A. D. 1926, did obtain the final decree of said court, therein granting the said Maryland Casualty Company, a certain relief as against the principals of this bond. And said principals have appealed from said decree to the Circuit Court of Appeals of the United States, sitting at San Francisco, California, from all portions thereof granting the plaintiff any relief as against these principals, and for an order of said Court of Appeals, that the District Court be ordered to dismiss the bill of Maryland Casualty Company, in accordance with the prayer of the answer of these principals and defendants, interposed in the above cause. And said principals in this bond desire to supersede the effect of the decree of the District Court, so appealed from, pending a determination thereof.

NOW THEREFORE, the condition of this obligation is such that if the above principals in this bond, shall and do, as the appellants in their above-mentioned appeal, prosecute said appeal to effect, and answer to all damages and costs if they fail in said appeal, and pay to the Maryland Casualty Company all such costs as have accrued to it, and which may hereafter accrue to it, as well as all damages it may suffer on account of such appeal, upon such failure, then this obligation shall be void, otherwise to remain in full force and effect.

A. T. HAMMONS,
Superintendent of Banks of the State of Arizona.

J. S. DODSON,
By D. E. McLAUGHLIN,
One of His Attorneys of Record,
Principals.

[Corporate Seal of United States Fidelity and Guaranty Co.]

UNITED STATES FIDELITY AND GUARANTY CO.
By LLOYD C. HENNING,
Attorney-in-fact.

Approved this 13th day of July, 1926.

F. C. JACOBS,
Judge.

O. K.—E. M. W.

ORDER ENLARGING TIME TO FILE RECORD ON APPEAL IN THE CIRCUIT COURT OF APPEALS.

In the above-entitled cause, the abstract of the evidence re-engrossed to include, appellee's amendments thereto having been filed and approved, and good cause appearing to the Court for this order, it is now

ORDERED that the time for the filing of the record on appeal herein in the Circuit Court of Appeals for the Ninth Circuit and the return day on the citation on appeal herein is extended to and including the first day of November, 1926.

Dated at Phoenix, Arizona, in Chambers, this 16th day of September, 1926.

F. C. JACOBS,
United States District Judge.

O. K.—E. M. W.

ORDER EXTENDING TIME THIRTY DAYS FOR PREPARING AND FILING RECORD.

In the above-entitled cause it appearing to the Court that reasons exist due to unavoidable delay in the printing of the transcript of record, it is necessary that the defendants have an extension of time within which to prepare their appeal,—

IT IS THEREFORE ORDERED that the time for preparing and filing the transcript of record in the above-entitled cause be, and is hereby ex-

tended thirty days from and after the first day of November, 1926.

F. C. JACOBS,
Judge.

O. K.—E. M. W.

(Court and Cause.) No. E.-93—Pret.

ORDER EXTENDING TIME TO AND INCLUDING DECEMBER 20, 1926, FOR PREPARING AND FILING ABSTRACT OF RECORD.

In the above-entitled cause, it appearing to the Court that the attorneys for the plaintiff have stipulated that the defendants may have until and including the 20th day of December, 1926, within which to print and file the abstract of record,—

IT IS THEREFORE ORDERED that the time for preparing and filing the abstract of record in said cause is extended to and including the 20th day of December, 1926.

Done this, the 1st day of December, 1926.

F. C. JACOBS,
Judge.

O. K.—M. R. M.

January 13, 1927.

(Court and Cause.) No. E.-93—Pret.

ORDER EXTENDING TIME TO AND INCLUDING FEBRUARY 1, 1927, FOR PREPARING AND FILING RECORD.

In the above-entitled cause it appearing to the

Court that reasons exist due to unavoidable delay in the printing of the transcript of record, it is necessary that the defendants have an extension of time within which to prepare their appeal,—

IT IS THEREFORE ORDERED that the time for preparing and filing the transcript of record in the above-entitled cause be, and is hereby extended, up to and including the 1st day of February, 1927.

F. C. JACOBS,
Judge.

O. K.—M. R. M.

(Court and Cause.) No. E.-93—Prct.

ORDER EXTENDING TIME TO MAKE RETURN OF CITATION FOR APPEAL.

In the above-entitled cause, it appearing to the Court that printed copies of proposed abstract of record for appeal are one file with the Clerk of court for certification, and that more time will be required for so doing, and that therein a necessity has arisen for extending the time within which to make return upon the citation on appeal, and file abstract of record in Court of Appeals, on motion of the solicitors for defendants and appellants,—

IT IS ORDERED: That the time for making return upon citation for appeal, and filing record on appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, be and

is hereby extended for a period of thirty (30) days from date hereof.

Done this 31st day of January, A. D. 1927.

F. C. JACOBS,
Judge of District Court.

O. K.—M. R. M.

(Court and Cause.) No. E.-93—Prct.

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL IN THE CIRCUIT COURT OF APPEALS.

In the above-entitled cause it appearing to the Court that reasons exist due to unavoidable delay in the printing of the transcript of record, it is necessary that the defendants have an extension of time within which to prepare their appeal,—

IT IS THEREFORE ORDERED that the time for preparing and filing with the Clerk of the Circuit Court of Appeals at San Francisco, California, the transcript of record in the above-entitled cause be, and is hereby, extended thirty days from and after this day.

Dated at Phoenix, Arizona, this 2d day of March, 1927.

F. C. JACOBS,
District Judge.

O. K.—M. R. M.

[Title of Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD OF APPEAL AND RETURN OF CITATION ON APPEAL IN CIRCUIT COURT OF APPEALS.

In the above-entitled cause and matter, it appearing that unavoidable delay has arisen in connection with the certifying and making of the necessary return upon the citation upon appeal, due to mistakes made by the printer in preparing a printed abstract of record for such certification, and that further time will be necessary to complete the certification and return to the citation to the Circuit Court of Appeals, therefore upon application of the solicitors for the defendants,—

IT IS ORDERED: That the time *within a* return may be made to the citation on appeal, and a certified copy of the record of said appeal may be returned to the Circuit Court of Appeals, be and is extended 30 days from and after March 31st, A. D. 1927.

Dated March 31st, 1927.

F. C. JACOBS,
District Judge.

[Endorsed]: Filed Mar. 31, 1927.
O. K.—M. R. M.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Maryland Casualty Company, a Corporation, Plaintiff, versus A. T. Hammons, etc., et al., Defendants, said case being numbered 93 on the Equity Docket of the Prescott Division of this court.

I further certify that pages 5 to 308, inclusive, of the foregoing abstract of record constitutes a full, true and correct copy of the original records, papers and files in said case remaining on file and of record in my office, except the endorsements on said originals, including my filing endorsement, which said endorsements have been omitted from this certified transcript of the record by direction of the solicitors for the defendants (appellants). I further certify that no praecipe was filed by counsel for either party.

And I further certify that there is also annexed to this transcript the original Citation on Appeal issued in said cause.

And I further certify that the cost of comparing said abstract of record, amounting to Forty-eight and 20–100 Dollars has been paid to me by the above-named defendants (appellants).

WITNESS my hand and the seal of said court this 28th day of April, 1927.

[Seal] C. R. McFALL,
Clerk, United States District Court in and for the District of Arizona.

By M. R. Malcolm,
Deputy Clerk.

[Endorsed]: No. 5136. United States Circuit Court of Appeals for the Ninth Circuit. A. T. Hammons, Superintendent of Banks of the State of Arizona, and J. S. Dodson, Special Deputy Superintendent of Banks for the State of Arizona, Appellants, vs. Maryland Casualty Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed May 2, 1927.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

BRIEF FOR APPELLEE

United States Circuit Court of Appeals

Ninth Circuit

14

No. 5136

A. T. HAMMONS, SUPERINTENDENT OF BANKS FOR THE STATE OF ARIZONA, AND J. S. DODSON, SPECIAL DEPUTY SUPERINTENDENT OF BANKS FOR THE STATE OF ARIZONA,

APPELLANTS

Vs.

MARYLAND CASUALTY COMPANY, a Corporation,

APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

FRANCIS, C. WILSON, ESQ.,
Santa Fe, New Mexico
FRANK E. CURLEY
SAMUEL L. PATTEE
Tucson, Arizona
Solicitors for Appellee.

SANTA FE NEW MEXICAN PUBLISHING CORPORATION

United States Circuit Court of Appeals
Ninth Circuit

No. 5136

A. T. HAMMONS, SUPERINTENDENT OF BANKS FOR THE STATE OF ARIZONA, AND J. S. DODSON, SPECIAL DEPUTY SUPERINTENDENT OF BANKS FOR THE STATE OF ARIZONA,

APPELLANTS

Vs.

MARYLAND CASUALTY COMPANY, a Corporation,

APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

BRIEF FOR APPELLEE

Statement of Facts

The Maryland Casualty Company, a corporation under and by virtue of the laws of the State of Maryland, brought suit in June, 1925, against A. T. Hammons, Superintendent of Banks, J. S. Dodson, Special Deputy Superintendent of Banks in charge of the Bank of Winslow, an insolvent banking corporation, and George J. Schaeffer, Treasurer of Navajo County, and Navajo County, a public corporation by virtue of the laws of the State of Arizona.

It appears from the complaint (Tr. 2-17) that plaintiff corporation was surety upon four bonds, securing the County of Navajo against loss on funds of the County, deposited in the Bank of Winslow, of Winslow, Arizona. The bonds are attached to the complaint as Exhibits A, B, C and D, and in the aggregate amount to $40,000.

The Bank of Winslow, the principal in the said bonds, became insolvent and closed its doors on the fourth day of October, 1924. At that time there were funds of the County of Navajo on deposit in the bank in the aggregate sum of $52,164.20. This deposit was covered by the four bonds of the plaintiff as above described, and by thirty-five Town of Winslow Improvement Bonds, worth the sum of $12,519.61, and Navajo County registered warrants in the aggregate sum of $7,379.30, which indemnity equaled the total amount of $59,899.01. The defendant Dodson was placed in charge of the insolvent institution by the defendant A. T. Hammons, Superintendent of Banks, under the laws of Arizona. At the date when the Bank closed it was the owner of registered warrants issued by Navajo County in the sum of $23,691.60.

It appears from the complaint (Tr. p. 9) that after the Bank of Winslow closed and the defendant Dodson took possession of its assets, he made demand upon the defendant Schaeffer for the return of bonds of the own of Winslow of the par value of $7,000, which were then held by the said Schaeffer as a part of the pledge above enumerated to secure the County deposit in said Bank, and the said Schaeffer, without any authority and in violation of the rights of the plaintiff in the said pledge, returned the said bonds to said Dodson, who then pretended to hold the said bonds free from the pledge to the County of Navajo, and, as is alleged in the complaint, then threatened and intended to use this pledge for the benefit of the

general creditors of the trust estate. The balance of the Town of Winslow Improvement Bonds amounting to about $5,500, had been reduced to cash and the proceeds applied to the reduction of the debt due Navajo County, by the defendant Schaeffer, County Treasurer. It also appeared that Schaeffer had proceeded in the same manner to reduce the County Warrants pledged as security to the County, to cash, and had applied them or the proceeds thereof in reduction of the debt, so that at the time of the filing of the suit, the total debt had been reduced to $37,752.44.

As regards the title to the registered warrants which the Bank owned at the time it closed its doors, it appeared that the Bank of Winslow had pledged, prior to its insolvency, to the Treasurer of Apache County to secure deposits of that County in the Bank, registered warrants of Navajo County in the total sum of $8,110.38; and it was claimed by the plaintiff that this pledge was in violation of the laws of the State of Arizona, and that the County of Apache should return the said warrants to the Bank of Winslow, or Dodson as deputy of the Superintendent of Banks, in charge thereof.

The plaintiff sets out the disposition of the total number of registered warrants owned by the Bank prior to its insolvency (Tr. p. 13). From this statement it appears that there were in the possession of the Special Deputy Superintendent of Banks Dodson, registered warrants of Navajo County in the sum of $11,213.44, registered warrants of said County pledged by the Bank of Winslow to Apache County, in the aggregate sum of $8,110.38, and warrants in transit in the aggregate sum of $5,012.86.

The complainant in the lower court then proceeds to state its cause of action, and the complaint recites that

due demand was made of Dodson, in charge of the Bank of Winslow, to allow offsets in the sum total of the registered warrants in his possession, and that he failed and refused to do so, and in fact threatened to sell and transfer the said warrants and to thereby destroy the offset; that said Dodson also refused to turn over the bonds of the Improvement District of the Town of Winslow of which he had obtained possession by virtue of his demand upon Schaeffer as above recited, and that he threatened to sell the same and thereby deprive the complainant of this credit, which it could obtain, if the bonds were in the possession of Schaeffer, by subrogation after it had paid whatever sum was due the County after the offsets had been determined and allowed.

The prayer was for decree against Hammons, Dodson, Schaeffer, and the County, for the allowance of the offsets and credits as disclosed by the complaint.

The defendant Hammons, Superintendent of Banks, and the defendant Dodson, Special Deputy in charge of the Bank of Winslow, filed a motion to dismiss the complaint, on the ground that the Federal Court had no jurisdiction of the matters set out in the bill, for the reason that the matters therein set forth were subject to the jurisdiction of the Superior Court of the State of Arizona in and for the County of Navajo, under the laws of the State of Arizona (Tr. pp. 38, 39).

Thereafter Hammons and Dodson filed their answers, consisting generally of a justification of the refusal of Dodson to allow the offsets claimed by the complainant, and of his action in requiring Schaeffer, after the Bank had closed, to return the bonds pledged to him as Treasurer of Navajo County to secure the funds of that County in the Bank of Winslow. Schaeffer and Nava-

jo County also filed motions and answers which are not in the record here.

On application for a preliminary injunction, the Court heard the motion to dismiss the bill of complaint and overruled it and granted a temporary injunction to the complainant.

Thereafter the proceedings went to trial upon the issues and the case was tried on the 7th day of January, 1926, at Phoenix, before Federal Judge Jacobs.

At that time a stipulation was entered into between the parties, whereby it was admitted that the allegations of paragraphs 2 and 3 of the bill of complaint were true, and that at the date of the suspension of the Bank of Winslow there was on deposit to the credit of Navajo County in that bank the sum of $51,209.75, of which $15,000 was inactive funds and the rest of the deposit constituted active funds of said County; that paragraph 5 of the bill of complaint was correct, and that at the time of the suspension of the Bank of Winslow the defendant Hammons, as Superintendent of Banks and by virtue of his office in possession of the Bank and its securities, came into possession of registered warrants of Navajo County in the amount of $10,922.44, and that on the date of the failure of the Bank there was in the possession of the defendant Schaeffer as County Treasurer of Navajo County $7,379.40 of registered warrants of Navajo County, pledged as security for the County funds on deposit in the said Bank; that at the date the Bank of Winslow closed its doors to-wit, October 4, 1924, the defendant Schaeffer, County Treasurer, was in possession of improvement bonds of the Town of Winslow in the aggregate amount of $12,519.60, and that on October 23, 1924, he returned $7,000 of these bnods to the defendant Dodson, then in charge of said Bank of Winslow, at the re-

quest of said Dodson, and that said Schaeffer converted the rest of said bonds into cash, and also liquidated the registered warrants pledged as aforesaid, and applied the proceeds of the said bonds and said registered warrants in reduction of the debt of the Bank to the County (Tr. pp. 73-75).

The County Treasurer, defendant Schaeffer, was placed on the witness stand by complainant and the registered county warrants were identified by him as they were produced by the defendant Hammons, Superintendent of Banks. The list of the warrants so identified, and a sample of each warrant, is shown in the record, on pages 181 to 213, inclusive.

In view of the stipulation it was not necessary to prove the facts as to the bonds of the Improvement District, and the State Superintendent of Banks admitted that he had possession of the bonds returned by Schaeffer to Dodson as above stated (Tr. pp. 140, 153).

Upon the proof presented in the lower court a decree was entered allowing to the complainant offsets on account of registered warrants, owned and possessed by the Bank when it closed, in the following sums:

General School District Warrants, and Manual Training School Warrants	$6,313.38
Salary Fund Warrants, aggregating	2,311.04
Road Fund Warrants, aggregating	792.95
Making a total of	$9,417.37

Interest was allowed on the foregoing from their respective dates to the 4th day of October, 1924, the date when the Bank closed. After allowing the offset, the Court in effect held that the amount due from the Bank of Winslow to the County of Navajo would equal the net

sum remaining, when such deduction was made from $37,-752.44, which last named sum was what remained of the original indebtedness of the Bank to Navajo County after the County Treasurer had liquidated the Improvement Bonds remaining in his possession and the registered School Warrants pledged as security. The Court did not attempt to determine the net amount, but the balance can be ascertained by reckoning the interest on each warrant to October 4, 1924, and adding this interest so obtained to the principal of each warrant, then getting the aggregate of all the warrants, and deducting that aggregate from $37,752.44, the interest, of course, being computed from the date of registration of each warrant.

The court then held that Schaeffer could not legally return the Town Improvement Bonds to Hammons or his representative Dodson, after the Bank had closed, and held further that upon the payment of the balance due after the offset had been deducted as above stated, the complainant would be subrogated to the right of the County to those bonds, and that Hammons should return them to the County, which in turn should turn them over to the plaintiff upon the discharge of the balance due.

It was further adjudged that the complainant, upon the payment of the amount due, should be decreed to be a general creditor of the Bank of Winslow, and should be entitled to all the rights, dividends and payments which had then been made or should be made in the future to other general creditors of the Bank of Winslow, and that the defendant Hammons, as Superintendent of Banks, in charge of the liquidation of said Bank of Winslow, should pay such dividends to the complainant.

The Court also held that the Navajo County Warrants pledged to Apache County, was a lawful pledge and

could not be claimed as an offset by the complainant (Tr. pp. 216-222).

From this decree the defendants Hammons and Dodson took an appeal under the Act of Congress dated February 13, 1911, and under Rule 23 of the Circuit Court of Appeals of the Ninth Circuit, assigning errors as appearing on pages 223 and 239 of the Transcript. The decree was entered April 19, 1926, and the appeal and assignment of errors, and the order allowing appeal, were filed and entered on June 26, 1926.

The assignments of error one, two and three are to the effect that the Court had no jurisdiction of the matters submitted by the bill of complaint, because the matter of the liquidation of the Bank was in the Superior Court of the State of Arizona in and for the County of Navajo, on the date when the case was filed in the Federal Court.

Assignments Nos. 4, 5, 6, 7, 8 and 9, are all addressed to the allowance of the offset of the registered warrants.

Included in the Transcript (pp. 239 to 256) are extracts from a newspaper of August 1, 1924, the relevancy of which is not apparent. These pages are not exhibits and certainly could not be injected into the record as proof of anything. We do not understand upon what theory they appear in the record as a part of it.

The return day of the citation on appeal is the 11th day of August, 1926 (Tr. p. 257). There was no extension of time granted within this return day, the first order attempting to enlarge the time appearing to have been entered on the 16th day of September, 1926 (Tr. p. 261). This order enlarged the time, or attempted to do so, to the 1st day of November, 1926, and the next one enlarged it thirty days from the 1st day of November, 1926, but

bears no date (Tr. pp. 261-2) so that it cannot be told whether it was in time or not. The next order was entered on the 1st day of December, 1926, which would not have been within the time, because thirty days from November 1st would have expired at midnight November 30th, 1926. The next extension time was granted December 1st, 1926, until, and including the 20th day of December, 1926, and the next order was apparently entered January 13, 1927, long after the date in the preceding order had expired, and extended the time to February 1st, 1927. The succeeding orders do not seem to have been in time, and we especially refer to the order appearing at the bottom of page 263 and top of page 264, which gave thirty days from the 31st day of January, the next order having been entered the 2nd day of March, 1927, and giving thirty days from and after said date. The next order was entered March 31st, 1927, and gave thirty days from that date, but as a matter of fact the record was not filed until May 2nd, 1927, which fell outside of the time within which the record could have been filed.

It should be pointed out that no praecipe was filed for the appellants in this cause (Tr. 266), and it is apparent that the first bill of complaint and the answers of the defendants Schaeffer and the County of Navajo have been omitted from the record. The answer of said defendants to the amended bill was twenty-one pages long and was signed by the County Attorney, the Attorney General and W. E. Ryan, special counsel. In view of failure of appellants to file a praecipe this omission becomes material as will hereafter be shown.

POINT I

THE APPEAL SHOULD BE DISMISSED

It is the general rule in the United States Circuit Court of Appeals that all parties having interest in the cause and affected by the decree should join in the appeal. Kidder v. Fidelity Ins. Trust & S. D. Co. 44 C. C. A. 593, 105 Fed. 821; Loveless v. Ransom, 46 C. C. A. 515, 107 Fed. 627 and cases cited; Simpson v. Greeley, 20 Wall. 158, 22 L. ed. 339; Sipperley v. Smith, 155 U. S. 86, 39 L. ed. 79, 15 Sup. Ct. Rep. 15; Davis v. Mercantile Trust Co. 152 U. S. 593, 38 L. ed. 564, 14 Sup. Ct. Rep. 693; Wilson v. Kiesel, 164 U. S. 252, 41 L. ed. 423, 17 Sup. Ct. Rep. 124; St. Louis United Elevator Co. v. Nichols, 34 C. C. A. 90, 91 Fed. 833; Dodson v. Fletcher, 24 C. C. A. 69, 49 U. S. App. 61, 78 Fed. 214; Hedges v. Seibert Cylinder Oil Cup Co. 1 C. C. A. 594, 3 U. S. App. 25, 50 Fed. 643; Aiken v. Smith, 4 C. C. A. 654, 2 U. S. App. 618, 54 Fed. 896; Humes v. Third Nat. Bank, 4 C. C. A. 668, 13 U. S. App. 86, 54 Fed. 917; Hardee v. Wilson, 146 U. S. 180, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; Fordyce v. Trigg, 175 U. S. 723, 44 L. ed. 337, 20 Sup. Ct. Rep. 1024.

The defendants in this case (Tr. 2) were A. T. Hammons, Superintendent of Banks of the State of Arizona, J. S. Dodson, Special Deputy Superintendent in charge of the Bank of Winslow and its assets, George J. Schaeffer, Treasurer of Navajo County, and Navajo County, a quasi public corporation organized and existing under and by virtue of the laws of the State of Arizona with power to sue and be sued. The prayer (Tr. 16) asked that the said defendants immediately list the credits and offsets due the county as they existed on the 4th day of October, 1924, between the County and the Bank of Wins-

low, the said date being the date when the bank closed, and that the amount due the County from the Bank in the hands of the State Superintendent of Banks and his deputy be satisfied and discharged to the extent of the warrants, both registered and unregistered, owned on the 4th day of October, 1924, by the Bank of Winslow, and also to the extent of the value of the Improvement Bonds of the town of Winslow held by the County Treasurer, the defendant Schaeffer, on that date. The decree (Tr. 216), a joint judgment against the defendants Hammons, Schaeffer,and Navajo County, found that the sum of money due the County was thirty-seven thousand seven hundred fifty-two and 44-100 dollars ($37,752.44), and that the complainant should have as offsets against the County, the warrants listed in the sum of nine thousand four hundred seventeen and 37-100 dollars ($9,417.37), and that defendant, Navajo County, and the defendant, Hammons, and the defendant Schaeffer as County Treasurer, carry out the terms of the decree so that the offset should become effective. The decree then provides that the complainant shall pay the defendant Schaeffer the balance due after the offset is allowed, and that the defendant Schaeffer shall turn over the Town of Winslow Improvement Bonds which he returned to the defendant Dodson after the bank closed so that if the complainant paid the balance due after the offset was allowed, it could be subrogated to the right of the County to these bonds and should have possession of the same.

It is evident that the finality of that decree against all the defendants can only be determined in an appeal to which defendant Schaeffer and defendant Navajo County were parties. There is no averment in the record. nor any showing of a summons and severance as to the said defendants. Certainly the decree against the several de-

fendants is joint in substance. It deals with the interests of the several defendants in one subject matter, to-wit, the right of the complainant in the lower court to an offset and to be subrogated to the bonds returned by Schaeffer to Dodson after the closing of the bank. The record fails to show that the defendant Schaeffer and the defendant Navajo County filed a twenty-one page answer to the first amended bill of the complainant, which amended bill is the one appearing in the record to which reference has already been made frequently. The record fails to disclose that this answer to the amended bill called upon the plaintiff to pay into court the "just and full sum of forty thousand dollars with interest thereon at the rate of six per cent per annum from October 4th, 1924, for the use and benefit of the defendant corporation, that the bill of complaint be dismissed as to both of these answering defendants". This omission from the record will be discussed later in the point raised as to the failure to file and serve a praecipe in this appeal.

It is the law that the omission of the defendants against whom a joint judgment has been entered from an appeal is jurisdictional unless there has been a summons and severance. Continental and Commercial Trust and Savings Bank et al. v. Corey Brothers Construction Co. et al. (C. C. A. 9th Circuit) 205 Fed. 282; Ibbs v. Archer, 185 Fed. 37 (C. C. A. 3rd Circuit); Loveless v. Ransom, 46 C. C. A. 515, 107 Fed. 626; Hook v. Mercantile Trust Co. 36 C. C. A. 645, 95 Fed. 41-49; Kidder v. Fidelity Ins. Trust & S. D. Co. 44 C. C. A. 593. 105 Fed. 821; Ayres v. Polsdorfer, 45 C. C. A. 24, 105 Fed. 737; Dolan v. Jennings, 139 U. S. 387, 35 L. ed. 217, 11 Sup. Ct. Rep. 584; Estes v. Trabue, 128 U. S. 230, 32 L. ed. 437, 9 Sup. Ct. Rep. 58; Hanrick v. Patrick, 119 U. S. 163. 30 L. ed. 402, 7 Sup. Ct. Rep. 147. The Columbia, 15 C. C. A. 91, 29 U.

S. App. 647, 67 Fed. 942; Fitzpatrick v. Graham, 56 C. C. A. 95, 119 Fed. 353; Hedges v. Seivert Cylinder Oil Cup Co. 1 C. C. A. 594, 3 U. S. App. 25, 50 Fed. 643.

There has been no summons or severance in this case. The record discloses that the appellants, Hammons and Dodson made no application to the Judge in the lower court for a severance, and no request upon the defendants Schaeffer and Navajo County for them to join in the appeal. Without such showing there is no jurisdiction in this court of the appeal. Faulkner v. Hutchins, 61 C. C. A. 425, 126 Fed. 362; Copland v. Waldron, 66 C. C. A. 271, 133 Fed. 217; Provident Life & Trust Co. v. Camden & T. R. Co. 101 C. C. A. 68, 177 Fed. 854; Detroit v. Guaranty Trust Co. 93 C. C. A. 604, 168 Fed. 610; Inglehart v. Stansbury, 151 U. S. 68, 38 L. ed. 76, 14 Sup. Ct. Rep. 237; Beardsley v. Arkansas & L. R. Co. 158 U. S. 123, 39 L. ed. 919, 15 Sup. Ct. Rep. 786.

Objection may be made at any time since the matter is jurisdictional. Loveless v. Ransom, 46 C. C. A. 515, 107 Fed. 626; Ayres v. Polsdorfer, 45 C. C. A. 24, 105 Fed. 737.

Under the foregoing authorities this appeal should be dismissed.

No praecipe for record was filed, and there is no proof that appellants pursued the requirements of Equity Rule Seventy-five (226 U. S. 671). The answers of the defendant Schaeffer and the defendant Navajo County, are not included in the record. Those answers are material portions of the record in that they disclose the defense of those defendants to be substantially that of defendants Hammons and Dodson and that Schaeffer and Navajo County are jointly defendants with them making common cause against the plaintiff. The appeal should be dismissed. Wade et al. v. Leach, 2 F. (2nd) 367.

The transcript was not filed in time. The last extension granted was thirty days from and after March 31st, 1927 (Tr. 265), and the record was filed on May 2nd, 1927,—two days too late (Tr. 267). There is nothing to show that the orders extending the time (Tr. 261 to 265), were ever filed with the Clerk of this Court. Chamberlain Transportation Co. v. South Pier Coal Co. 126 Fed. 165; In re Alden Electric Co. 123 Fed. 425.

The certificate of the clerk of the lower court (Tr. 213) is insufficient. He does not certify that the transcript is complete. Ruby v. Atkinson, 93 Fed. 577; Meyer v. Mansur Implement Co. 85 Fed. 874, 875; Farmers' Loan and Trust Co. v. Eaton, 114 Fed. 14.

The certificate does not show that there was any stipulation of counsel, or that the clerk was guided by Equity Rule Seventy-five in preparing the transcript. Burnham v. North Chicago St. Ry. Co. 87 Fed. 168. See also, Cutting v. Tavares 61 Fed. 150. The clerk certifies that he has omitted his endorsements by request of the solicitors for the appellants. It is apparent that those endorsements are as much a portion of the record as the pleadings themselves, and the failure to include them has no basis, so far as we know, in any correct preparation of an appeal. Certainly the appellee did not agree to any such omission which might well be material, especially in connection with the orders entered after the appeal was granted, and especially as to the filing of the alleged statement of the evidence. Thus, there is no proper record before this court. (Tr. 266).

POINT II.

THE LOWER COURT HAD JURISDICTION OF THE CAUSE

The bill in the lower court shows the requisite diversity of citizenship and amount involved to give the United States District Court for the District of Arizona, jurisdiction. The banking code of Arizona appears in the Special Session Laws of 1922. Suits of this character have been sustained in the Federal Courts. Allen Bank Commissioner et al. v. United States, 285 Fed. 678, 683 (C. C. A. 1st Circuit). The laws of Massachusetts upon the subject construed in the above case are substantially those of the State of Arizona. There is a New York statute of a similar character, and the New York courts have consistently held that the superintendent may sue and be sued. In re Carnegie Trust Co. 146 N. Y. S. 809. The same is true in California, Mercantile Trust Co. v. Miller 137 Pac. 913, 916. It is not necessary to obtain leave of court to sue a Receiver of a National Bank appointed by the Comptroller of the Currency. Ex Parte Chetwood, 165 U. S. 443, 41 L. ed. 782. See also, Strain v. U. S. Fidelity & Guaranty Co. 292 Fed. 694; Duke v. Jenks 291 Fed. 282; Fidelity and Deposit Co. v. Duke, 293 Fed. 661. In the case cited and depended upon by counsel for appellants, the decision was by the United States District Court for the Southern District of New York, and the court did not hold that it was necessary to obtain permission of the State Court before bringing the suit against the State Superintendent of Banks. The matter involved was a question of preference and not one of setoff or of an unlawful attempt to acquire property by the State Superintendent of Banks to which he was not entitled as the liquidator of the Bank of Winslow. The case is not in

point. As to all of the other cases cited by counsel, the points involved and decided arose from receivership cases in which either the State or the Federal Court had first taken possession of the trust estate by the appointment of a receiver, and the courts denied the right of any other court than that which had first so taken possession to attempt to take jurisdiction over the *res* in another proceeding. The case at bar is in no respect the same.

The powers of the superior court over the statutory receivership are defined by the laws of the State of Arizona as shown by the excerpt from those laws appearing on page sixteen of appellees' brief. The court does not take into its possession through the receiver the assets of the bank and has no control over them except in cases of sale of the property of the bankrupt bank. The Superintendent of Banks collects the debts due, and for such purposes is authorized to institute, maintain and defend suits irrespective and apart from any authority by or from the Superior Court. Section 48 of the Act requires the claimants to make proof of claims to the Superintendent of Banks with which the court has nothing to do, and the Superintendent of the Banks passes on the justice and validity of the claim, and can reject the same without any order or intervention of any character of the court, and where a claim is rejected the claimant can bring suit upon it six months after the service of notice upon him of such rejection. The statute does not give the Superior Court any supervision over these matters, or any right to intervene in such cases. As a matter of fact, the surety company had no claim to present at the time when the suit was instituted and had only an equitable right to the offsets and to the improvement district bonds by subrogation as such surety, both of which rights had been refused and rejected by the defendants in the case.

It cannot be questioned but that a suit in equity can be maintained by a surety to compel an offset between its principal and its creditor where special circumstances intervene entitling the surety to equitable relief. The rule as laid down in 21 R. C. L., page 1080, is as follows:

> "It is the general rule that a surety, upon showing some special equitable ground, as, for example, the insolvency of his principal, may obtain a setoff in equity."

and the following cases sustain the right to maintain the proceeding, especially where the principal is bankrupt: Scholze v. Steiner (Ala.) 14 So. 552, 553; Perry v. Pye (Mass.) 102 N. E. 653, 657; Mitchell v. Holman (Oregon) 47 Pac. 616; Becker v. Northway, 44 Minn. 61; 20 A. S. R. 543; Downer v. Dana, 17 Vt. 518; Brinson v. Sanders, 54 N. C. 210; Armstrong v. Warner, (Ohio) 31 N. E. 877, 17 L. R. A. 466; Willoughby v. Hall 18 Okla. 555; 90 Pac. 1017; Crutcher v. Trabne, 5 Dana 80. In Scholze v. Steiner, supra, the Court said:

> "Ordinarily, a surety, when sued upon his obligation, cannot avail himself of an independent cause of action existing against the plaintiff in favor of his principal as a defense or counterclaim. It is for the principal to determine what use he will make of such cause of action, and the surety cannot control his discretion. Lasher v. Williamson, 55 N. Y. 619; Morgan v. Smith, 7 Hun. 244. By statute in this state (Code Sec. 2681) it is provided that a co-maker or surety, sued alone, may with the consent of his co-maker or principal, avail himself, by way of set-off, of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such comaker or principal. But this statute by its terms is confined to cases where the surety is sued alone, and

where he has the consent of the principal to avail himself of the set-off, and, consequently, gives no support to the bill in this case. Appellees' right of set-off is independent of the statute, and is referable to the jurisdiction in courts of equity arising in such cases from the insolvency of the principal. The doctrine generally recognized is that, where the principal has a valid claim against the creditor, the surety will not be compelled to pay the claim, and seek a doubtful remedy against the insolvent principal, but, on being sued on his contract, will be allowed in equity to show the insolvency of his principal, and set off the claim against the creditor. Morgan v. Smith, supra; Gillespie v. Torrance, 25 N. Y. 306. According to this rule, the insolvency of Lesser, the principal, furnishes a special ground of equity, giving to the court jurisdiction of the question of set-off presented by the bill, and sufficiently establishes the right of appellees, in equity, to set off pro tanto the judgment of Allen & Taylor against Herman Scholze, which was purchased by Lesser, unless that right is defeated by the prior transfer by Herman Scholze to Robert Scholze of his judgment against Lesser and appellees. Watts v. Sayre,75 Ala. 397, 400."

Passing on the general question, the Court in Becker v. Northway, supra, defined the law as follows:

"The author may here state the rule more broadly than the decided cases will justify; for the interposition of a court of equity to enforce set-offs that would not be allowed at law was based on the condition that otherwise the surety would be without adequate remedy. Bankruptcy or insolvency of the principal debtor presents such a case; for if the surety be, in such case, compelled to pay, and resort to an action against the bankrupt or insolvent principal debtor, he is practically without remedy. So where a

remedy may be afforded him without prejudice to the creditor suing him,—and ordinarily he cannot be prejudiced by setting off a debt he owes the principal against the principal's debt to him, for which, he is suing the surety,—equity will furnish that remedy; Ex parte Hanson, 18 Ves. 232; Cheetham v. Crook, McClel. & Y. 307; Wathen v. Chamberlin, 8 Dana, 164; Gillespie v. Torrance, 25 N. Y. 306; 82 Am. Dec. 355; Hiner v. Newton, 30 Wis. 640.

"We do not mean to intimate that the surety, when sued alone, may, in that action, have the set-off; for a court will if possible, avoid the litigation of a debt when only one of the parties to the debt is before it. The surety might have to bring a separate action against the creditor and principal debtor to enforce the set-off, and, pending that action enjoin the action against him."

In the case of Armstrong v. Warner, supra, the Court held that the allowance of an offset under such circumstances as existed in the instant case is not a preference to the Surety over other creditors of a general character and the language of the Court is instructive:

"This section, as we understand it, does not prohibit the allowance of any vaild set-off, legal or equitable, which a debtor of a bank may have against any obligation owing to it by him at the time of its insolvency. The allowance of such a set-off is not the creation of a preference, but an ascertainment of the just amount due. To exact the payment of more than that would be unjust, and the section, we think, does not require that to be done. Warner's equitable right of set off existing at the time of the failure of the Fidelity Bank, and his obligations, having passed to the Receiver subject to that right, only the balance due on those obligations after deducting the off-sets constituted assets of the bank in the receiver's hands for disposition in accordance with the provisions of

the Federal statutes. Counsel for plaintiff, in error cite the case of Armstrong v. Scott, 36 Fed. Rep. 63, as maintaining a contrary doctrine. But the later cases of Snyders Sons Co. v. Armstrong, 37 Fed. 18, and Yardley v. Clothier, 49 Fed. Rep. 337, after a full review and discussion of many authorities, and a careful consideration of the statutes, decline to follow Armstrong v. Scott. Those decisions are in accord with the views as we have expressed, and render it unnecessary to enlarge the discussion here."

That there is equity in the bill is obvious from the foregoing.

POINT III

UNDER THE SETTLED LAW OF THE STATE OF ARIZONA THE LOWER COURT PROPERLY ALLOWED THE OFF-SETS

The Supreme Court of the State of Arizona has decided that a depositor in an insolvent bank in the hands of the Superintendent of Banks is entitled to set off, against his indebtedness to the bank on a note, the amount of his deposit. Hammons v. Grant, et al. (Ariz.) 225 Pac. 485. It is clear that the salary fund warrants aggregating two thousand three hundred eleven and 4-100 ($2,311.-04) dollars, and the road fund warrants aggregating seven hundred ninety-two and 95-100 dollars ($792.95) are within the case of Jarvis, County Treasurer, vs. Hammons, State Superintendent, 256 Pac. 362, in which the Supreme Court of Arizona was called upon to pass upon the question of an off-set claimed by the county against a defunct bank in the hands of the State Superintendent of Banks for county warrants. It was held that the cri-

terion as to whether such an off-set would lie was whether an action would lie against the county to recover the indebtedness for which the warrants were given as evidence. The record in the case at bar clearly discloses that the lower court was correct in this particular (Tr. 216) and the decision by the Supreme Court of Arizona upon a matter of law under the statutes of the State, is controlling here. On the rehearing of the above case reported page 985, Vol. 257 Pac. Rep., the court reversed its ruling on the matter of school warrants and sustained an off-set on that account. The exhibit page 181 of the Transcript shows that the school warrants were issued as an order upon the Treasurer of the County to pay the payee, and all of these warrants were registered ,thus bringing them within the rule stated in the case on rehearing. All of the school warrants were issued in the same form as the one appearing on page 181 of the Transcript.

In view of the foregoing decision by the Supreme Court of the State of Arizona, the lower court was correct in its findings and decision as regards the off-sets allowed on account of registered warrants (Tr. 216).

POINT IV

THE COMPLAINANT IN THE LOWER COURT WAS ENTITLTD TO BE SUBROGATED TO THE CLAIM OF THE COUNTY IN THE IMPROVEMENT BONDS OF THE TOWN OF WINSLOW UPON PAYMENT OF THE AMOUNT FOUND DUE TO THE COUNTY BY THE DEFUNCT BANK.

On April 23, 1923, Improvements Bonds of the town of Winslow were pledged to the County of Navajo as security for the deposits of the County in the Arizona

State Bank of Winslow as the same are listed in the Transcript, pages 192, 193. After that date there was a merger of the Arizona State Bank with the Bank of Winslow and the assets of the Arizona State Bank were transferred to the Bank of Winslow (Tr. 140). The defendant Dodson testified that he received seven thousand dollars worth of these Improvements Bonds from the defendant Schaeffer after the bank was closed, and that he listed them as assets of the Bank of Winslow (Tr. 153). The defendant Schaeffer testified that he held these Bonds after the merger and that the Bank of Winslow raised no objection as security for the deposits of the Bank of Winslow (Tr. 86). The bonds were pledged jointly with the surety company bonds and the county warrants to secure the deposits of the County in the Bank, and the County Treasurer liquidated the county warrants pledged, and enough of the Improvement Bonds to reduce the liability of the bank to the county from $51,209.75 to $37,752.44, for which there was security surety bonds in the sum of forty thousand dollars, and the balance of the Improvement Bonds amounted to seven thousand dollars, but on October 23, 1924, the County Treasurer returned seven thousand dollars of those bonds to the Assistant Bank Examiner, thereby altering the condition existing at the time the bank closed, to-wit, October 4, 1924, and destroying the right of the surety company to be subrogated to the right of the county to these bonds if and when the surety company paid the loss. The surety company was prepared to pay the loss, but the county having destroyed the right of the surety company to be subrogated to these bonds by returning them to Dodson, it became necessary to enforce that right by proceedings in the lower court to the end that the bonds might be returned to the county or turned over to the surety com-

pany when the loss is paid after the off-sets were allowed. The principle involved is one of subrogation and of course, the surety company was not obligated to pay until the off-sets were properly allowed, which had been refused by the County and the State Superintendent of Banks. In fact, until those off-sets had been allowed, the amount due from the surety company to the county could not be determined. The lower court having determined those questions the amount due was fixed by it and the right of the surety company to become subrogated to the bonds upon the payment of that amount also became fixed by the decree of the lower court. It is elementary that whenever a party discharges an obligation in performance of a legal duty, to-wit, an obligation for the performance of which he was legally bound, where his liability was subsequent to that of another party, his principal, to-wit, in the case at bar the Bank of Winslow, he is entitled to be subrogated to and to have the benefit of all the rights of the creditor to all securities which may at any time have been put into the creditor's hands by the principal debtor. We do not deem it necessary to submit authority upon so elementary a proposition of law. The creditor in this case, Navajo County and the Treasurer thereof, had in its hands when the bank closed the bonds of the Improvement District of the Town of Winslow, and when the bank closed the status of those bonds became fixed and could not thereafter be altered by any act of the creditor whereby the right of the surety to be subrogated to the right of the county in these bonds could be destroyed. It is also elementary that where the creditor destroys by its act this right of subrogation and such rights are released to the prejudice of the surety, the surety is released from its obligation, at least *pro tanto*. We do not understand that appellants deny the foregoing,

and in fact we gather that they admit the law to be as stated. The contention seems to be on the part of the appellants that the surety has not paid and therefore cannot claim any rights of subrogation in the bonds in question. This would be true if it had been possible at any time material to the cause of action in the lower court for the correct amount to have been ascertained in order that the payment could have been made by the plaintiff. Failure in this connection was not attributable to the fault of the plaintiff but to the defendants who refused the off-sets and, thus, it became necessary to file the suit in the lower court to determine just what the plaintiff did owe when the off-sets should be allowed. The decree in the lower court gives no right to the plaintiff in the bonds until the amount is paid, and thus follows the law and does not depart from it, to the effect that until the full amount of the indebtedness as therein found to be due is fully discharged by the plaintiff, it shall not have the benefit of the bonds by subrogation. It is of course, the intent of the plaintiff to pay the judgment and then to claim the bonds by virtue of its subrogated rights to the rights of the county. Since the appeal of the appellants it has been impossible to carry out that portion of the decree. Appellants seem to argue only that as the plaintiff has not paid it cannot be subrogated, and as this is the only point argued, we point to the provision of the decree (Tr. 217, 218) to show that plaintiff can obtain no rights in the bonds until it has paid in full the balance due to the county. Thus, the decree is fully in accord with the law upon the subject and gives the plaintiff no rights which the law does not properly accord to the surety under the circumstances stated and admitted in this case.

CONCLUSION

There appears in the record a series of schedules (Tr. 239 to 257) which apparently have no place there. They do not seem to be exhibits, nor yet are they evidence in any respect so far as the record discloses. We submit that these pages should be disregarded by the court in this appeal.

We submit that in view of the foregoing:

(a) The appeal should be dismissed and the lower court affirmed.

(b) That in any event there is no error in the record and the decree of the lower court should be affirmed.

Respectfully submitted,

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IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

15

A. T. HAMMONS, Superintendent of Banks for the State of Arizona, and J. S. DODSON, Special Deputy Superintendent of Banks for the State of Arizona,

Appellants,

vs.

MARYLAND CASUALTY COMPANY, a Corporation,

Appellee.

No. 5136

APPELLANT'S BRIEF

SIDNEY SAPP,
Holbrook, Arizona,
JOHN W. MURPHY,
Attorney General of the State of Arizona, and
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Phoenix, Arizona,
Special Counsel,
Solicitors and of Counsel for Appellants.

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

On the 4th day of October, 1924, the Bank of Winslow, a state bank, was insolvent and on that day the Appellant Hammons, in his official capacity as Superintendent of Banks, and under authority of the Arizona Banking Code, took possession of the bank and its assets. and appointed Appellant Dodson Special Deputy, for the purpose of taking charge of, and liquidating the affairs of the bank. The powers of these officers were such as designated by the banking code, and their relation to the Superior Court of Navajo County, the county of Arizona in which the insolvent bank was doing business, was that similar to receivers appointed by said state court, and subject to the same jurisdiction and authority of said court as if in fact by it appointed receiver in said matter. (Sec. 46, Banking Code, appears on page 225 of Transcript of Record in Assignment of Error No. 11.)

That the Bank of Winslow was a depositary of county funds of the County of Navajo to the stipulated amount of $51,209.75, at the date of its insolvency. Of this amount $15,000.00 was "inactive funds" and the balance "active funds". The inactive funds were in fact funds raised by taxation to retire when due the bonded debts of the county and its school districts. The active funds were funds raised for general county purposes, and in fact, under the "budget law" of the state, consisted of as many different funds as there were county purposes, and in fact distinctly appropriated to specific amounts for each such purpose; this active fund also included money collected by the county for

school district purposes, and which included amounts collected under general county tax levy for school purposes, special district levies for extra expenses of distinct districts, and became subject to warrants drawn for the purposes of each district after the County Superintendent of Schools had officially distributed the gross collections for school purposes, to the particular districts. (The "budget" of Navajo County appears in Transcript on pages 239-257.) So far as the "active funds" were concerned, and in the deposit, these were balances of previous fiscal years, none of the school or other funds collected upon the 1924 tax-rolls, were shown to have been deposited in the Bank of Winslow. (See testimony of Treasurer Schaefer, page 114 of Transcript, that $10,000.00 was available somewhere in some bank for school purposes, and page 117, 118, of transcript, when apportioned to various districts by School Superintendent.) There is an entire lack of evidence of any such apportionment, and it appears that all of the school warrants which are included in the set-off allowance of the decree were registered as against the school funds of special districts, and were warrants drawn for the purposes of only eight out of twenty-five school districts, and with only $10,000.00 collected and available on October 4, 1924, and this not yet apportioned among the twenty-five districts, it would be impossible to say that the registered school warrants, amounting to $6313.38, allowed in the decree as a set-off, were payable out of the gross undistributed $10,000 collected for purposes of all the school districts of the county. The bill alleges

that prior to suit, in negotiations between the county treasurer and defendant Dodson, the bank debt had been partially adjusted to an extent that the remaining debt of the bank to the county was $37,-752.44, and in which settlement certain warrants had been paid, certain bonds been sold by the treasurer of Navajo county, and $7000.00 of these bonds returned to the Receiver Hammons, and in its Bill seeks to have all of the registered warrants, not yet called for redemption, held in status quo, and the $7000.00 of bonds also so held, until the District Court of the United States could determine the alleged right of plaintiff below to a set-off through subrogation of the amount of such warrants, and upon payment of the remaining balance of its liability as surety, to have delivered to it the $7000.00 of bonds. Asked for and obtained in the District Court an injunction pending final hearing of the suit to the above end and result.

The defendants interposed their motion to dismiss both the original Bill, and again the amended Bill, upon grounds of entire absence of showing of equity, and upon the grounds that the state court through its receiver was actually in control of the assets and directing the matters of a liquidation of the insolvent Bank of Winslow, prior to the Bill, the District Court was without jurisdiction to entertain the Bill, or grant any relief involving those matters and assets. (For motion to dismiss see Transcript, page 38). This motion was overruled. The District Court granted the injunctive relief. Defendants answered, and in that answer and upon the hearing of the cause insisted upon in their de-

fense, and still insist upon that the decree is erroneous for the reasons specified in the various assignments of error, which errors here briefly stated are:

(1) The jurisdiction of the state court having attached to the subject matters and assets involved in this suit prior to the filing of the bill, the District Court was without jurisdiction to grant plaintiff any relief by injunction or otherwise directed to those subject matters and assets.

(2) That the suit is an attempt to enjoin and supervise by injunction proceedings in a state court.

(3) That equity follows the law, and in this case the statutes of the state of Arizona having specifically declared that warrants may in the hands of the original payee be used in payment of debts due the county, and it appearing that the Bank of Winslow acquired its warrants by purchase only, it is urged that neither the general statute of set-offs, nor any theory of equitable set-off can be applied to the relief of Plaintiff.

(4) It being an admitted fact that all of the warrants involved are registered warrants, and that no call had been made for payment of such warrants, the Bank itself, prior to its insolvency could not have demanded payment. and its surety has no greater right through the fact of insolvency than did the bank. The insolvency simply preserves existing rights and equities, but does not create new ones as against the estate of the bank.

(5) There was no showing in the record that

any funds had been apportioned to any of the school districts the warrants of which are used as set-off in the decree, and it would compel the County to divert public funds to purposes, and at times without legal authority, if a set-off be enforced on account of any funds at all in the bank of Winslow at the time of its failure.

(6) There exists no authority in the banking law of the state of Arizona under which a state bank may pledge its assets to secure a surety upon its repositary bond to a county, that the purpose of the depositary bond is to protect the general depositors, and the effect of the decree in this case would be to prefer a surety over the general creditors of the bank, and thus defeat the very purpose of the bond itself.

(7) That the state laws of Arizona control as to the time when and the manner in which registered county warrants are to be paid, and it is urged that the courts cannot advance the time nor change the manner of payment, for the benefit of the holder of any such warrants nor anyone claiming through subrogation or otherwise to the rights of the holder. That the public policy connected with the collection, use, and appropriation of public funds requires that every law regulating the time of use be enforced and not evaded, and persons who take registered warrants take them subject to the law, and without equities in their favor contrary thereto, and in this case the set-off allowed in the decree evades and is contrary to the laws of the state.

ARGUMENT AND CITATION OF AUTHORITIES.

Appellant urges as assignment No. 1, that the Court erred in overruling the motion of Appellants to dismiss the complaint for the jurisdictional reason that the state Court and its receiver had obtained and was exercising jurisdiction over the assets and property of the insolvent bank, prior to this suit, all as appears in the assignment itself on page 223 of Transcript of Record.

The facts which support this motion appear in the amended Bill itself, as well as in the original Bill. Those facts, with reference to the Bill, are and appear as follows:—

(A) The Maryland Casualty Company became and was surety upon the depositary bond of the Bank of Winslow to the aggregate amount of $40,000.00 prior to insolvency of the bank, and was so liable at the date of insolvency. (Transcript page 2, Bill par. 2.)

(B) That on the 4th day of October, 1924, the Bank of Winslow closed its doors . . was insolvent . . and pursuant to the laws of the State of Arizona, the Defendant A. T. Hammons, Superintendent of Banks took over said bank, and appointed the said Defendant J. S. Dodson, Special Superintendent of Banks his agent to take charge of said bank for the purpose of liquidation, and the said defendant J. S. Dodson, is now and ever since has been, the agent in charge of said bank. (Transcript page 4, Bill par. 3)

(C) It appears from the report of the Defendant Dodson, acting as agent of the State Superintendent of Banks, filed by him in the Superior Court of Navajo County, Arizona, that at the date the said Bank of Winslow suspended payments, the said bank was the holder and owner for value of certain warrants of Defendant, County of Winslowa, as follows: (Here follows a list of warrants so held and reported to the Court). (See Transcript page 5, Par. 5 of Bill.)

(D) It appears that Defendant Dodson at the time of filing the Bill of complaint, was holding as assets of the insolvent bank not only all the registered warrants of Navajo County, but $7000.00 of improvement Bonds of Town of Winslow, latter obtained from the County treasurer of Navajo County, after a partial adjustment of the relations between the county and the bank. (See Transcript page 9, Par. 7 of Bill.)

(E) It appears from the Bill that the above bonds, and registered warrants held by Defendants for the benefit of the trust estate of the bank, (Transcript page 9.) and fairly construed the only threatened action of the Defendants was an intent to convert said bonds and warrants into cash, for the benefit of the trust estate of the Bank.

(F) There was no allegation whatever as to what other assets over and above $23,691.60 of registered warrants, and the $7000.00 of improvement bonds of Town of Winslow, were held by the Defendants as *quasi* receivers of the bank. If these were all the assets then the Bill of complaint, with

the injunction granted thereon, operated as an injunction restraining proceedings in the state court, by absolutely restraining all further power of the Superintendent of Banks directed to any further liquidation of the affairs of the insolvent bank. If those were not all the assets, then the injunctive relief granted by the district court, operated to that extent, to enjoin and restrain the liquidation of those assets under the authority of the state court.

The motion to dismiss the Bill for want of jurisdiction was of course directed to matters of allegations appearing upon the face of the Bill. Admissions by Plaintiff in the Bill as to existing facts. Appellants urge that these admissions, so appearing were sufficient to defeat the jurisdiction of the District Court, under the rule of the cases applicable to such a state of facts that:—

> "The law is well settled, that the Court which first acquires jurisdiction over the *res* will hold it to the exclusion of all other courts. The rule applies to suits to enforce liens against specific property, to marshal assets, administer trusts, liquidate insolvent estates, etc."
>
> Mace v. Mayfield 10 Federal (2nd Ed.) 231, citing Covell v. Heyman, 111 U. S. 176.

Other cases in which the same rule has been applied are, in part as follows:—

> Heidritter v. Elizabeth Oil Cloth Co. 112 U. S. 294, at page 305.
>
> McKinney v. Langdon 209 Fed. 330.

Dickenson v. Willis 239 Fed. 171 at page 174.

Wabash Railroad Co. v. Adelbert Collegs 208 U. S. 38.

Murphy v. John Hoffman Company, 211 U. S. 562.

In re Bologh, 185 Fed. 825.

These cases do not by any means exhaust the cases, but appear to be leading cases, wherein many more cases are cited to the same effect and rule of comity.

The only possible question in connection with an application of the rule of comity as between state and federal courts, as announced in above cases, is as to whether as a matter of fact and law, the Superior Court of Navajo County Arizona had been given through statutory provisions, or by procedure therein, jurisdiction of the assets and matters connected with the liquidation of the insolvent bank of Winslow.

Under the constitution of the state of Arizona, its superior courts are vested with jurisdiction:—

> "In all cases of equity and in all cases of law which involve the title to, or the possession of real property, . . . and in all other cases in which the demand or value of the property in controversy amount to two hundred dollars exclusive of interest and costs . . . The superior Court shall also have original jurisdiction in all cases and of all proceedings in which juris-

diction shall not have been vested exclusively in some other court."

Arizona Const. Art. VI Sec. 6.

As applied to the present case, the legislature of the State of Arizona, at its special session in 1922, (Session Laws S. S. 1922 Secs. forty-four, forty-five, and forty-six, and Forty-nine,) did provide for jurisdiction in its superior Courts, and define the relations of the Superintendent of Banks thereto, in cases of insolvent banks, as follows:—

"METHOD OF LIQUIDATION OR REORGANIZATION. Whenever it shall appear to the Superintendent of Banks that any bank has violated the provisions of its articles of incorporation or any law of this state, or is conducting its business in an unsafe or unauthorized manner, or if the capital of any bank is impaired, or if any bank shall refuse to submit its books, papers and concerns to the inspection of any examiner, or if any officer thereof shall refuse to be examined upon oath touching the concerns of any such bank or if any bank shall suspend payment of its obligations, or if from any examination or report provided for by this Act the Superintendent of Banks shall have reason to conclude that such bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue business, the Superintendent of Banks may forthwith take possession of the property and business of such bank and retain

such possession until such bank shall resume business, or its affairs be finally liquidated as herein provided.

On taking possession of the property of any bank, the Superintendent of Banks shall notify the Governor and the Attorney General in writing of his action and shall forthwith give notice of such fact to all banks, trust companies and individuals or firms holding or in possession of its assets. No bank, trust company, savings bank, firm or individual, knowing of such taking possession by the Superintendent of Banks or notified as aforesaid, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred, against any of its assets. Such bank, may with the consent of the Superintendent of Banks, resume business upon such conditions as may be approved by him. Whenever any such bank, of whose property and business the Superintendent of Banks, has taken as aforesaid, deems itself aggrieved thereby, it may at any time within ten days days after taking such possession apply to the Superior Court of the County in which such bank is located to enjoin further proceedings; and said court after notifying the Superintendent of Banks to show cause why further proceedings should not be enjoined and after hearing the allegations and proof of the parties and determining the facts, may upon the merits, dismiss such applications or enjoin the Superintendent of Banks, from further pro-

ceeding and direct him to surrender such business and property to such bank."

"ASSETS OF INSOLVENT BANKS VESTED IN SUPERINTENDENT OF BANKS. Upon taking charge of the property and business of such bank, the Superintendent of Banks shall forthwith be vested at law and in equity with the sole, exclusive and unconditional ownership and title in himself, his successors in office and assigns, of all of the property and assets of said bank, whether the same are situated within this State or elsewhere, such ownership and title in the Superintendent of Banks to be free and unaffected by any levy, judgment, attachment or other lien obtained thereafter as against the property of said bank through legal proceedings and free from and unaffected by any equity arising in favor of or obtained by third persons after the Superintendent of Banks has taken charge, as aforesaid, but subject to any and all equities in favor of third persons which have arisen or been obtained as against any of said property or assets prior to the taking charge thereof by said Superintendent of Banks; and with respect to the property and assets of any bank in his hands and unadministered upon at the date when this amendment takes effect, such title and ownership of the Superintendent of Banks shall relate back and be deemed to have vested in him as of the date when he took charge of the business of any such bank. All levies, judgment, attachments, or other liens,

obtained through legal or equitable proceedings in this State or elsewhere, as against any bank organized under the laws of this State, at any time within thirty days prior to the taking charge by the Superintendent of Banks of the property and affairs of said Bank, shall be null and void in case the Superintendent of Banks takes charge of its property and affairs, and the property affected by such levy, judgment, attachment or other liens so obtained obtained shall be forthwith wholly discharged and released from the same, and shall pass to the Superintendent of Banks as a part of the estate of said bank; provided that nothing herein contained shall have effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien, of a bona fide purchaser for value who shall have acquired the same without notice of reasonable cause for inquiry. Upon taking possession of the property and business of any bank the Superintendent of Banks is authorized to collect money due it, and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof as hereinafter provided. The Superintendent of Banks shall collect all debts due and claims belonging to it, and for such purposes is authorized to institute, maintain and defend suits and other proceedings in this State and elsewhere, and upon the order of the Superior Court of the county in which it is doing business, may sell or compound all bad or doubtful debts, and on like order may sell all its real and

personal property on such terms and at public or private sale, as the court shall direct, and if necessary to enforce in this State or elsewhere the liabilities of its stockholders.

"POWERS OF SUPERIOR COURT. The Superior Court shall have the power to make orders for sale of the property and assets of the bank, real, personal and mixed, and orders confirming such sales; and all orders made prior to the date of the adoption and approval of this amendment, by the Superior Court of this State authorizing or confirming sale of the property and assets of banks administered therein shall be and hereby are validated."

"RELATIONS OF COURT AND SUPERINTENDENT OF BANKS WHEN ACTING AS LIQUIDATING AGENT. When the affairs of any bank have come into the hands of the Superintendent of Banks for liquidation the relations between the Superior Court and the Superintendent of Banks shall be the same as the relations of the Superior Court and a receiver under the laws now existing, and the Superior Court shall have the same authority and jurisdiction over the Superintendent of Banks in such matters of liquidation as it would over receivers appointed by the court, unless in this Act otherwise provided."

"Section 49. SUPERINTENDENT OF BANKS TO MAKE RETURN OF INVENTORY. Upon taking possession of the property and assets of such bank, the Superinten-

dent of Banks shall make an inventory of the assets in duplicate, one to be filed in the office of the Superintendent of Banks, and one in the office of the Clerk of the Superior Court in the County in which the said institution was doing business, and the Clerk of said Court shall give such case a number on the Superior Court Docket etc."

(It appears in the transcript that the above provisions was followed, that the case was docketed and still pending in the Superior Court of Navajo County. Testimony of Miss Tandy, pages 141-142 of Transcript.)

The Federal Court in New York in passing upon the question of a conflict of jurisdiction between the state and federal court which arose in connection with the Superintendent of Banks in that state and over the matters and assets of an insolvent bank, under a statute almost identical with the Arizona statute, says:—

"The Superintendent of banks in taking charge of a banking institution does so by virtue of his authority as such superintendent under the statute, and not as the result of any proceeding in court. His authority is somewhat analygous to that of a receiver of a National bank appointed by the Comptroller of the Currency. Section 19, of the banking code, however, provides that the administration in certain respects shall be subject to the action of the Supreme Court of the State of New York.

"It does not seem necessary or proper for this Court to pass upon these questions of priority because I think the determination of these questions is vested by law in the Supreme Court of the State of New York. The provisions in Section 19 of the banking law that the dividends to be declared by the Superintendent of Banks are "to be paid to such persons and in such amounts and upon such notice as may be directed by the Supreme Court in the Judicial District in which the corporation or individual banker is located" in my opinion confers upon the New York Supreme Court the sole power of determining what creditors of the trust company are entitled to preference and what amounts shall be paid them as dividends."

In re Bologh 185 Fed 825.

The following language of Mr. Justice Mathews, in Heiritter v. Elizabeth Oil Cloth Co., 112 U. S. 305, 5 Sup. Ct. Rep. 135, expresses fully by view upon this point: ("It is merely an application of the familiar and necessary rule, so often applied, which governs the relation of court of concurrent jurisdiction, where as in the case here, it concerns those of a state and of the United States, constituted by the authority of district governments, though exercising jurisdiction over the same territory. That rule has no reference to the supremacy of one tribunal over another; nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter

of necessity, and therefore, of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction."

Heidritter v. Elizabeth Oil Cloth Co. 112 U. S. 305

The rule in respect to the jurisdiction of a receivership court which obtains prior possession of the property was well set forth in the case of McKinney v. Landon, 209 Fed. 300 where Judge Hook said: "The action in the state court was begun first, but the federal court first appointed receivers. Did the subsequent appointment of receivers by the state court relate back so that it may be said that it was in constructiove possession of the property from the time the action was commenced? It is a maxim of the law that a court having possession of property can not be deprived thereof until its jurisdiction is surrendered or exhausted, and that no other court has a right to interfere. It is a principle of right and of law which leaves nothing to the discretion of another court and may not be varied to suit the convenience of litigants. Merritt v. American Steel Range Co., 24 C. C. A. 530, 79 Fed. 228. It is essential to the dignity and authority of every judicial tribunal and is especially valuable for the prevention of unseemly conflicts between federal courts and the courts of

the states. As between them it is reciprocally operative—mutually protective and prohibitive. The most difficulty arises in determining when possession of property has been taken, when jurisdiction has attached to the exclusion or postponement of that of other courts. It is settled, however, that actual sizure or possession is not essential, according to that jurisdiction may be acquired by acts which, according to established precedure, stand for dominion and in effect subject the property to judicial control. It may be by the mere commencement of an action the object, or one of the objects of which is to control, affect, or direct its disposition. See Mound City Co. v. Castleman, 110 C. C. A. 55 187 Fed. 121, and the cases cited. The principle often applies "where suits are brought to enforce liens against specific property to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.' Farmers' Loan & Trust Co. vs Railroad, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. The mere fact that an exigency calling for a receiver may arise does not make the jurisdiction of the court in that respect relate to the beginning of the action (Shields v. Coleman, 157 U. S. 168, 178 15 Sup. Ct. 570, 39 L. Ed. 660) as perhaps where it is an ordinary aid to execution on a final judgment and dependent upon conditions or circumstances that may or may not occur.

But where the declared purpose of an action in whole or in part is directed to specific property, and the full accomplishment thereof may require judicial dominion and control, jurisdiction of the property attaches at the beginning of the action. And it is so if dominion and control are essential to the action, though not yet exercised. We think enough has been said of the nature of the action in the state court to show that it is within the principle invoked. Judicial dominion of the combined and comingled properties of the offending corporations is vitally necessary to the purposes of the action. In no other way could the marshaling and separation be effectually accomplished.

"It is urged that the jurisdictions of the state and federal courts are not concurrent with respect to the subject-matters of the suits, but in questions like that before us the test is prior possession, actual or constructive, and not concurrency of jurisdiction. The subject matter of which the one court has jurisdiction may be wholly without the power of the other. Prior possession by a court having jurisdiction of the case before it according to the laws of the sovereignty under which it was organized entitled it to hold until it is through."

In the case of Dickenson vs. Willis 239 Fed. 171 we quote the following from the opinion commencing on page 174.

"After a careful study of the cases I am satisfied that the line must be drawn between

those cases which seek to recover a judgment against the receiver in the nature of damages and those cases which involve the possession of the property in the hands of the receiver, or the use of such property or the management thereof—the administration of the property in his hands. As to questions of possession, use, and management, I am satisfied that the appointing court, whether it be state or federal, has exclusive jurisdiction. In 34 Cyc. 416, it is said: 'The rule requiring leave to sue a receiver is sometimes modified by local statutes, and has been changed by act of Congress so far as the court of the United States are concerned, by permitting a receiver appointed by those courts to be sued in another jurisdiction in cases where his act is drawn in question in transactions connected with the property in his hands, arising during the discharge of his duties as such official. Such provision does not authorize the bringing of all actions without limitation, but only such as are of the class mentioned; as to others, leave of court should be obtained. Thus a state providing that a receiver may be sued in respect to any act or transaction in carrying on the business connected with the property intrusted to him does not authorize a suit against the receiver, without leave for the corpus of the estate, and the operation of the federal statute has been restricted in the same manner to causes in respect to acts or transactions of the receiver, and does not limit the power of the court which

appointed the receiver to protect the property in his custody from external attack."

Justice Moody, in Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed 379, says:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession has acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states. They are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, per-

sons, and controversies. They are not based upon any supposed superiority of one court over the others but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union" (Citing many cases.)

In Murphy v. John Hoffman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, it is said:

"Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. Wabash R. Co. v. Adelbert College, 208, U. S. 38, 54, 28 Sup. C. R. 182, 52 L. Ed. 379, 386."

Whatever rights the Plaintiff may have had, or has, could and should properly, have been urged in the state court. Presumably, and in the theory upon which the rule of comity is based, those rights would have been fully protected by the state Court.

Appellant urges the point that the Bill is without equity. Just what difference can it possibly make to the Plaintiff, what becomes of the other securities held by the County of Navajo to secure its deposits in the insolvent bank. Or what possible difference can it or could it have made, whether the registered warrants were sold, or presented for payment and paid by the County, when if as a matter of law, or by the rule of subrogation, those bonds and those warrants should pro rate to reduce the liability of Plaintiff as surety. If the county had dissipated or lost its other securities, or was bound to accept its registered warrants as payment upon its bank deposit, it seems quite certain that the Plaintiff could have been relieved of liability to the proper amount, without all the circuity of an injunction suit, the impounding of assets, and the other interference with the actions of the Appellants directed to the liquidation of the assets and affairs of the insolvent bank. The Plaintiff could have refused to pay its liability upon its depositary bond to the county, until the county allowed any proper set off. Appellants have at all times been unable to appreciate why they should be drawn into a suit upon a matter primarily between the county of Navajo and the Plaintiff. And to Appellants the whole proceeding from which the appeal is taken

seems as matter which could have been fully determined in a suit at law, and if so, the suit is without equity, and the Bill should have been dismissed.

Returning to the main argument as to the jurisdiction. If the federal court had jurisdiction to tie up any portion of the assets of the insolvent bank, then it could tie up all the assets, pending a determination of the alleged rights of litigations as to those assets. In this case, the Superintendent of Banks would in the first instance be subject to the orders of the state court, as to how, and to whom he should distribute the assets. By the decree from which he appeals, that Superintendent is ordered to do thus and so, with a portion of the assets. The question is, which order must he obey. If counsel for appellants understand the rule of comity laid down by the cases cited in this brief, the purpose of that rule is to avoid any such conflict and confusion to be attached to the liquidation of the assets of insolvents.

Assignment of error No. II was made and intended to point out to this Court the statutory relations of the Superintendent of Banks to the state court in those cases in which an insolvent bank comes into the hands of that officer. The statute already quoted in full in connection with Assignment No. 1, says that "when the affairs of any bank have come into the hands of the Superintendent of Banks for liquidation the relations between the Superior Court and the Superintendent of Banks shall be the same as the relations of the Superior Court and a receiver under the laws now existing,

and the Superior Court shall have the same authority and jurisdiction over the Superintendent of Banks in such matters as it would over receivers appointed by the Court, unless in this act otherwise provided."

A reading of the above provision confirms the position that the Superintendent of Banks becomes a statutory receiver, from the time that officer takes possession of the affairs of an insolvent bank for the purposes of liquidation. The Bill in this case in Paragraph 3, page 4 of Transcript alleges and thus admits the possession for the purposes of liquidation, and that being so the jurisdiction of the state court attached to the property and affairs of the insolvent bank without any further act.

The Arizona Supreme Court has construed the above provision according to its plain reading, in

Hammons v. Grant, 225 Pac. 485.

In the Bolough case, 185 Fed. 825 above quoted the Court says:— The provisions of Sec. 19 of the banking law . . confers upon the New York Supreme Court the sole power to determine what creditors of the trust Company are entitled to preferences and what amounts shall be paid to them in dividends."

The fundamental principle involved in this case is that the Legislature of the state of Arizona has provided a procedure for the winding up of the affairs of insolvent state banks therein. It has vested judicial jurisdiction of matters connected with such liquidations, in the Superior Courts of the county in which the insolvent bank has its place

of business. The control of the state court is thus made complete and exclusive as to every question which can arise as between the receiver, i. e. the Superintendent of Banks, treated as a receiver and persons having claims of any kind or nature against the estate or its assets in the hands of that officer. The officer takes the assets as he finds them. In this case the warrants which the decree of the district Court allowed as a set-off in favor of Plaintiff surety Company, were admitted among the assets so taken over. The $7000.00 of improvement bonds of the Town of Winslow, became assets in the hands of the Superintendent after a partial adjustment of affairs between the bank and the County of Navajo. If the Plaintiff had a claim of any nature connected with those assets, then under the plain provisions of Section 48, of the 1922 Banking Code of Arizona it could and should have presented it to the Superintendent for allowance or rejection. That Section 48, in part reads as follows:

> "The Superintendent of Banks shall cause notice to be given by advertisement in such newspapers as he may direct weekly for eight sonsecutive weeks, calling on all persons who may have claims against it to present the same to him and make legal proof thereof at a place and at a time to be fixed by the Superintendent of Banks. . . If the Superintendent of Banks doubts the justice and validity of any claim he may reject the same. . . . An action upon a claim so rejected must be brought within six months after such service."

There is no allegation nor is there any proof the Plaintiff surety company ever attempted to make legal proof of its claims as asserted in the present Bill.

There is no allegation in the Bill that the provisions of the state banking code of Arizona, fail to provide adequate remedies for adequate relief to plaintiff whatever its claim may have been against the assets, or claim for priority, preference, or what not, it might have. The Bill does not allege that the State Banking law denies Plaintiff any constitutional right, nor does the Bill allege the unconstitutionality of the act itself.

Under this condition and state of the law of Arizona, and the facts as alleged, Appellants again urge that the state has the power to provide for a liquidation of the affairs of its insolvent banks, a power to place the judicial determination of all matters pertaining to such liquidations in the state courts. That when that jurisdiction has attached as it does when the Superintendent takes possession of the property of an insolvent bank, as admittedly done in this case, the jurisdiction of the state court is complete, adequate, and exclusive, to the extent that the Federal Courts have no judicial power to undertake to direct the conduct of the receiver of the state Court as to any matter at all connected, directly or indirectly with the estate of the insolvent bank, claims against it, or the distribution of its assets.

Again we urge that the District Court should have dismissed the Bill upon motion, and erred in

refusing to do so, and erred in rendering the decree which is appealed from in this appeal.

Assignments of error Nos. IV, and XII, Pages 227 and 236, will become so closely connected in any argument directed to the errors therein pointed out, that a presentation of the two assignments together will save prolixity and perhaps avoid confusions.

In connection with these two assignments two points are raised:

(A) That when the legislature in Paragraph 2462, Revised Statutes of Arizona, 1913, Civil Code, provided with respect to county warrants the conditions under which holders of such warrants could use such warrants in payment of debts due the county, that provision became and was a special provision, excluded all other statutes relating to set-offs, and it not appearing that the Bank of Winslow as to any of the warrants was a payee named therein, it nor its subrogee could not use those warrants to liquidate any debt of the bank due the county.

(B) That when the legislature in paragraph 4642 and 4643, of 1913 Civil Code, made provision for depositary bonds, and made the condition of such bonds, "that such bank will promptly pay out to the parties entitled thereto, all public money in its hands, upon lawful demand therefor, and will, whenever required by law, pay over . . to the county treasurer such moneys, with interest as hereinafter provided", the legislature thereby provided in such manner as to exclude any possibility

that any question of any relation of or similar to that of ordinary debtor and creditor could arise as between a county and its depositary bank, and thus excluded any idea that any question of set-off as between those deposits and county warrants held by the bank acquired by it in due course.

(C) That in the two provisions of statute above referred to the state legislature has said in effect, a county will pay its registered warrants at times when same are called for payment, but regardless of any such warrants held by a bank, latter must pay out county money when demanded, except that if the bank is payee named in a warrant it may be used, when accompanied with sufficient money to pay its entire debt to the county. Not otherwise.

The statute as to set-offs in case of county warrants is set out in full in Assignment No. IV, Page 227 of Transcript, and reference is made thereto.

Provision is made in the statutes of Arizona, Civil Code 2440, for the registration of warrants, in cases where the fund upon which those registered warrants is insufficient to pay the particular warrants when presented for payment. These warrants were all registered. It is presumed that the officer did his duty when registering same and that no funds for payment existed in fact. And the set-off ordered by the court ignores the plain law as to time when such warrants become payable, and with that presumption of lack of funds available to pay the particular warrants still applying, the decree of the Court requiring the county to accept warrants drawn upon funds not sufficient, out of depositary

moneys, belonging to other public funds and appropriated for other public county purposes, appears to require the county officers to do unlawful acts.

Upon the propositions above presented, attention is called to citations and cases as follows:

15 Corpus Juris. 605, Sec. 313

15 Corpus Juris 606 Sec. 313,

First National Bank of Garden v. Commrs 52 Pac. 580.

La Forge v. McGee 6 Cal. 285.

15 Corpus Juris 584,

Bartol v. Holmes 41 Pac. 906.

Diggs v. Lobits, 43 Pacific 1069 at 1071

Ostling vs. People, 140 Pac. 173.

Rollins v. Board of Commrs. 199 Fed. 71 at 79.

Stryker v. Board of Commrs. 77 Fed. 567 at 574.

State v. Ownes 56 So. 296.

Forbes v. Bd. of Commrs. 47 Pac. 388.

King Iron Bridge & Mfg. Co. v. Otie Co. 124 U. S. 483.

Talley v. State 180 S. W. 330.

From the above cases it will appear that there exists a difference between "public funds" and "public money", in cases where public warrants are

drawn against and payable from particular funds, as in the case at bar. We quote as follows:—

"As a general rule orders or warrants against counties can be satisfied only out of the revenue available for the payment of the claims represented by such orders and warrants."

15 Corpus Juris, 605, Sec. 313.

When the order in which county warrants shall be paid is fixed by statute, it must be followed, it cannot be changed by county boards or courts.

15 Corpus Juris, 606, Sec. 313, cases in Notes 45 and 46.

"Notwithstanding a judgment has been recovered against a county upon its registered warrants, the amounts due thereon are properly payable in the same order as if such warrants had not been reduced to judgment, out of county funds available for the payment of registered warrants."

First Natl. Bank of Garden v. Comrs. 52 Pac. 580.

"In a number of states express provision is made for the setting apart of special funds for particular purposes. . . Whereas special county funds are authorized, and are in fact raised for particular purposes they must be applied thereto, and cannot be diverted to any other purpose, or transferred to any other fund."

15 Corpus Juris, page 584. Notes 65 and 66, for cases.

"If this could be done, the money belonging to any fund of the county might be taken therefrom, and placed to the credit of a different fund which the commissioners might see fit tot create or designate, and the administration of municipal affairs would be placed in hopeless confusion. (Decision was against any power of transferring money from the fund to which it belonged to a specially created fund.)

Bartob v. Holmes 41 Pacific, 906. (Wash.)

"A person who deals with a municipal corporation deals with it with reference to the law governing such corporation, and is bound by such law. The law providing the means and manner of payment by a municipal corporation is incorporated into and becomes a part of, any cotract between such corporation and any other persor. When the Plaintiff in this case accepted his warrants from the municipal authorities, he took it subject to the conditions and on the terms presented by law for its payment.

Diggs v. Lobitz, 43 Pacific 1089 at p. 1071.

Under a law pertaining to cities and towns, which required the passage of an annual appropriation bill, in which such authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes

for which such appropriations are made, and the amount appropriated for each object or purpose. With other provisions similar to but not as specifically restricting as the provisions of 4839-4842 of Revised Statutes of Arizona as amended in Chapter 52 Laws of 1921. The law provides for registration of warrants, and their payment upon call when funds are in the treasury applicable thereto. In brief from the pleadings and the stipulations of facts the city challenges the right of the realtor to have the funds in the hands of the treasurer, realized and to realized from the revenues for the fiscal year beginning April 1913, applied to payment of such warrant issued prior thereto, and claims the right to use such funds to discharge warrants drawn to meet current expenses for that period. The Court says:—

> As applicable to the facts of this case, the general rule is that a cause of action does not exist against a city upon a warrant *until a fund for its payment has been collected.* Forbes v. Grand County 47 Pac. 388. The fact that the revenues for a particular year are inadequate to meet the warrants for that year, payable out of such revenues, does not render the city liable thereon until a fund which can be applied to their payment, is raised or might have been, in the manner provided by law. . . Persons purchasing warrants take them subject to the mode of payment that the General assembly has provided. Stryker v. Board of Comm'rs of Grand Co. 77 Fed. 567.

Ostling v. People, 140 Pac. 173 at 175-6.

Following and citing Forbes v. Grand County, 47 Pac. 388.

King Iron Bridge Co. v. Otoe Co. 124 U. S. 459.

"Usually warrants purport to be for immediate payment, but where the city or county is in an embarrassed condition such payment cannot be made; and when the legislature provides they shall be paid in the order of registration this is equivalent to inserting in such warrant "Payable at any time when the cash in the fund is sufficient to pay this and all previous presented and registered warrants" and the law fixes the date of payment."

Rollins v. Board of Comm'rs. 199 Fed. 71 at 79 Following 77 Fed. 567.

"But when the laws of a state do prescribe the methods of paying an indebtedness which a municipal corporation has contracted and limit the rate of taxation for that purpose, *such method of payment is exclusive.* No Court has power to vary the mode of payment, or to increase the rate of taxation, although it may be that the means provided by law are defective or insufficient. Persons who become purchasers of the securities of a municipal corporation, whether bonds or warrants, must take notice of any limitations that have been imposed upon the power of taxation for their payment and of the provisions of law that have been to that end. Where some provision has been made to enable a municipal corporation

to discharge its debts, the fact that the provision so made is inadequate, will not authorize a court to devise a different plan, or to compel a larger exercise of the power of taxation. U. S. v. Macon County, 99 U. S. 582.

Stryker v. Board of Commr's 77 Fed. 567 at 574.

"Where special county funds are authorized for a particular purpose they must be applied thereto and cannot be diverted to any other purpose, or be transferred to any other fund."

15 CORPUS JURIS 584.

There is no statutory authority for the use of the term "General Fund" in county taxation. All funds are special in the sense that they may be applied only to such purposes as may be properly embraced therein . . . In making up of the millage to be levied, there may be many miscellaneous or contingent items which can be more conveniently grouped under one heading, but this grouping does not constitute a general fund for all purposes including those for which special levies are made, it yet remains a special fund for such purposes only as may be embraced therein.

State v. Ownes 56 So. 296 (Fla.)

In Colorado the statutes as to presentation of county warrants and payment thereof, or registration thereof to draw interest, are similar to Arizona statutes. In a case of a suit upon registered

warrants to compel payment thereof, the Court says:—

> "It is very evident, from these provisions that it was the intention of the legislature to provide for the payment of county warrants, in the order of their presentation, out of a fund to be realized from the levy and collection of the 10 mills provided for general county purposes, and not until such a fund had been collected, and was applicable to the payment of the warrant in its order of presentation, could the holder require payment thereof, and not until such time would any right of action accrue upon such warrant or order against the county, unless, perhaps, the board has been derelict in its duty in levying the amount of taxes authorized. King Iron Bridge & Mfg. Co. v. Otoe County, 124 U. S. 459, Brewer v. Otie County, 1 Neb. 373. The fact that the tax provided proves inadequate to meet such obligations of the county does not render the county liable for their payment in some other manner."

Forbes v. Bd. of Commr's of Grand Co. 47 Pac. 388.

> "Whoever deals with a county and takes in payment of his demand a warrant in the character of these. (Registered warrants involved) no time of payment being fixed, does so under the implied agreement that if there are no funds in the treasury out of which it can be satisfied, he will wait until the funds

can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition of the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed." Brewer v. Otie County, 1 Neb. 373, 382, 384. Quoted and followed in,

Kink Iron Bridge and Mafg. Co. v. County of Otie 124 U. S. 483.

In an Arkansas case, the right of set-off was asserted by sureties upon depositary bond of insolvent depositary bank, on account of warrants held by the bank when failed, the Court says:—

"The bank held the bridge warrants the same as they had been in the hands of any other holder who merely had the right tto present them to the county treasurer and received payment out of the funds appropriated for that purpose. It appears from the evidence that the depositary had only $100.00 of that fund, which was insufficient to meet the warrants, or, so far as the evidence goes, either one of them. There was, at any rate, no right of set-off; for, even if there had been funds in the county treasury to meet the warrants, the only right the bank had, as the holder of the warrants, was to present them to the treasurer for

> payment in the same manner that any other holder of warrants could have done. The obligation of the bank, as the depositary of public funds, and the sureties on its bond, was to pay the money over on demand, and the failure to pay over the money cannot be justified pro tanto by showing that the depositary was the owner at the time of county warrants.
>
> Talley v. State, 180 S. W. 330.

If it is true as shown by above authorities that the courts have refused to require warrants to be paid out of funds other than those upon which they are drawn. If it is true that persons who take warrants take them subject to the law regulating the time of payment, especially of registered warrants, and the courts have refused to make them payable except when current revenues have been collected to the funds upon which those warrants are drawn sufficient to pay them, then it is true that there was no such mutuality of credits as between the Bank of Winslow and the County of Navajo as would support any application of any rule of equitable set-off in this case. The County trusted the Bank only upon and in accordance with its depositary bond. A bond conditioned "to pay upon demand" all county moneys deposited. The Bank did not purchase the county warrants relying upon the fact that the county had a deposit in the bank, as a means of ultimately paying those warrants. The county in its warrants agreed to pay the holder "when in funds sufficient and available for the purposes for which the warrants were drawn."

The County of Navajo could have demanded every dollar of its deposit from the Bank of Winslow immediately prior to its failure, and if that demand had not been met, could have sued upon its depositary bond, and under the cases the bank could not have "set-off" the registered warrants now in question. The surety, Plaintiff would be in better position than the bank itself in that case.

The Talley case 180 S. W. 330 holds that such a set-off could not be made, in favor of a surety.

The question is, does insolvency change the equities or rather the strict law as applied to maturity and payment of warrants.

We urge that it does not.

The liability of the Plaintiff upon its surety bond was not fixed until the bank became insolvent. It has never in fact paid any amount upon its liability as surety for the bank. Hence it was not a creditor of the bank at the time of its insolvency.

The Arizona Supreme Court in the case of, Hammons, Supt, of Banks v. U. S. Fidelity & Guaranty Co. 248 Pacific, 1086

says:

> "Surety on depositary bond did not become creditor of depositary until it paid obligees, and that happened after the Superintendent of Banks took charge of the bank as insolvent, it was not entitled, either as subrogee or as assignee to off-set its claim therefor on fidelity bond on which it was surety for the bank's cashier."

We understand the general rule to be that when one of two or sureties commonly or concurrently, for the same principal, has paid then he may pursue the others. We also understand the rule that if a principal hold collateral as security, and is also secured by surety bond for the same debt, if the surety pays, then that surety is entitled to the benefit of the collateral. The converse of that rule is equally true, until the surety does pay, it is immaterial what other security the creditors may have. The payment alon is the step to be taken as the first elemtn necessary in any subrogation in favor of such a surety. In this case that elemtn is absolutely lacking. The Plaintiff has not as yet become a creditor of the Bank, and under the general rule of above case can not avail itself of any right of set off.

The fact must not be overlooked that the very purpose of a depository bond, is to protect the other depositors and creditors of an insolvent bank, from what might have been a preference in favor of public deposits in such banks. This purpose is discussed by the Arizona Supreme Court as follows:—

> "We think the plan for lending and safeguarding public moneys of the state and counties, provided in title 44 Civil Code, supra, in allowing the state to exact security from the depositary, where as no other depositor or patron of the bank is given the same privilege, must have been intended as a substitute for the common law prerogative." (Referring to a possible preference to the public in funds of an insolvent bank.)

As was well said in Smith v. Arnold, 176 S. W. 983: . . The law and sound public policy will not favor preferences in the liquidation of an insolvent bank; and in the absence of statutory provisions to the contrary, we see no reason why the funds deposited in the designated depoistary, in obedience to the statute should stand on any higher ground than the funds of other depositors. It was to protect the funds so deposited that the bond was required of the bank; *and we will not countenance any effort to relieve the bond* by an attempt to obtain a priority in the disbursements of the banks' assets, to the prejudice of the other depositors."

Central Bank of Wilcox v. Lowdermilk.
205 Pacific, at page 916.

"Ky. St. Sec. 4693, requiring state depositaries to give security for public funds, contemplated as such security the indorsements of individuals or a solvent bonding company, and not the pledging of assets of the depositary bank." And a pledge of such assets, to secure the public depositor and the surety upon a depositary bond, was held to be void.

We have pointed out in assignment No. V. (Transcript pages 228, 229, 230, and 231, the provisions of law which permits the Boards of Supervisors to create an expense fund, and therein and therefrom a "salary fund". It has already been pointed out that the expense fund was overdrawn some $47,000.00 at all times during the period of registering of the warrants in question.

That provision contemplates that current expenses, and current salaries be paid in cash. It also provides that when the purpose has been accomplished and there remains an excess in the funds, the Board of Supervisors may by resolution return that excess to the general funds and thereafter same shall be available for redemption of registered warrants in manner provided by law. There is no allegation of any such order having been made, nor any proof thereof. Hence this court may assume that registered "salary warrants" were not yet payable out of any funds in the treasurer's hands, and so were not due for any purpose of this case.

We respectfully submit that for reasons urged above the Appellants are entitled to a judgment of this Court, reversing the decree of the District Court, and dismissing the Plaintiff's Bill of Complaint. Etc., etc.

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